IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-17

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

BILLY J. McCOMBS, R. JAMES STILLINGS, d b a GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORPORATION, E. I. DU PONT DE NEMOURS & COMPANY, BILL FORNEY, and FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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July 3, 1978

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner United Gas Pipe Line Company ("United") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on February 9, 1978, and that the decision below be summarily reversed.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals is reported at 570 F.2d 1376. A copy is appended to this petition.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1978. (A. 94.) An order denying petitions for rehearing and suggestions for rehearing in banc filed by United and the Federal Energy Regulatory Commission ("Commission") [2] was entered on April 4, 1978. (A. 95.) The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), and 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Section 7(b) of the Natural Gas Act provides there can be no abandonment of certificated natural gas service to interstate commerce without the permission and approval of the Commission first had and obtained after due hearing and a prescribed finding by the Commission. The question here is whether an abandonment of a producer's certificated sale of natural gas is nevertheless effected, without any Commission hearing, finding or order, by the fact that gas production ceases from all the reserves then known to exist on the dedicated acreage.

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[1] The opinion below and the text of Section 19(b) of the Natural Gas Act are attached to this petition and are cited as "O". Other materials required to be appended under Rule 23 are set out in a separate printed Appendix and are cited as "A."

[2] "Commission" is used herein to refer both to the Federal Energy Regulatory Commission and to its predecessor, the Federal Power Commission.

STATUTES INVOLVED

Principally involved is Section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), which provides:

> *Abandonment of facilities or services; approval of Commission*
>
> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

Also involved is Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), which, because of its length, is separately appended. (O. 16.)

STATEMENT OF THE CASE

A. Nature of the Case

As in this Court's recent decision in *California* v. *Southland Royalty Co.*,[3] the issue here is whether a natural gas producer's certificated service obligation has terminated without Commission approval of abandonment pursuant to Section 7(b) of the Natural Gas Act. In this case, the court below held that when production ceased from the known reserves on the lease in question there was an abandonment even in the absence of Commission authorization. The issue is important to the Commission's administration of the Act because the court below held that the requirements of Section 7(b) were not applicable here, thus bypassing

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[3] 46 U.S.L.W. 4539 (1978).

the Commission's authority to withhold or condition abandonment approval. The issue also has enormous practical importance because of its impact upon the status of acreage subject to gas dedications to interstate commerce where production has ceased but no abandonment has been approved by the Commission.

B. Facts

The sole issue involved here is one of law. The pertinent facts are not in dispute.

On May 20, 1948, W. R. Quin obtained an oil and gas lease (the Butler B lease) covering approximately 163 acres in Karnes County, Texas. On April 29, 1953, Bee Quin, his widow, entered into a gas purchase contract with United, agreeing to sell to United the natural gas production from or attributable to certain leaseholds, including the Butler B lease.[4] There was no depth limitation in the lease or in the contract.

Following this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*,[5] Mrs. Quin applied to the Commission for certificates of public convenience and necessity authorizing the sale of the natural gas covered by the 1953 contract in interstate commerce to United. Her applications were granted by orders issued December 8, 1954 and December 14, 1954 in Docket Nos. G-2997 and G-2998, respectively. United installed a gathering facility and an above-ground field measuring station on the Butler B tract and received natural gas for its interstate pipeline system pursuant to the certificates issued to Mrs. Quin.

[4] The contract also covered the Butler A lease referred to in the opinion of the court below.

[5] 347 U.S. 672 (1954).

By a succession of transfers,[6] a group headed by Louis H. Haring became owner of the leasehold interest in the Butler B tract. On May 28, 1966, production ceased from the Butler No. 7 gas well, which was the only well producing gas on the lease at that time. Thereafter, Bay Rock Corporation, as operator for the Haring group, wrote United that the existing gas wells were depleted and that no other gas would be available at that time. On December 7, 1966, United advised Bay Rock that it intended to remove a portion of its gathering facilities for use elsewhere on its system but that such equipment would be reinstalled "[i]f, at some future date, you have further gas to deliver to us at the above delivery point, which will be subject to the terms of the above captioned contract."

Thereafter, no additional natural gas was produced from the Butler B lease until 1971. However, in August 1966, Bay Rock drilled a producing oil well, thereby keeping the Butler B lease in effect. In August 1968 and January 1971, letters from the Secretary of the Commission were sent to the producers advising them that if no further sales of gas were contemplated, it would be necessary for them to file applications to abandon service. (A. 97, 100.) The producers, however, never attempted to secure Commission approval for abandonment, nor did they raise the issue with United.

In 1971 and 1972, Haring assigned his working interest rights in certain deep horizons underlying the Butler B lease to National Exploration Company and to the Respondents known as the McCombs Group. In 1971 the new working interest owners discovered gas

[6] The first successor to Mrs. Quin was H. A. Pagenkopf. (See A. 5-6, 97-99.) The Commission issued Pagenkopf a successor in interest certificate on June 19, 1963 in Docket No. G-12694.

in lower horizons. Thereafter, notwithstanding objection by United, the McCombs Group commenced selling, and has continued to sell, all the new gas production attributable to the Butler B lease to Respondent E. I. du Pont de Nemours & Company ("du Pont") in intrastate commerce.

C. Proceedings Before the Commission

Acting on a complaint by United, the Commission in Opinion No. 740, issued August 20, 1975, found that the service from the Butler B lease had been initiated as authorized, so that production from the Butler B tract was dedicated to interstate commerce. (A. 1, 29-36.) The Commission held that, since there had been no abandonment under Section 7(b), the Butler B gas was required to be delivered to United and that the sales of gas in intrastate commerce were in violation of Section 7.[7]

D. Proceedings in the Court Below

The McCombs Group and du Pont petitioned the United States Court of Appeals for the Tenth Circuit for review of the Commission's determination.[8] Pending review, the court stayed the effect of the Commission's order so that subsequent gas production from the Butler B lease has all been sold in intrastate commerce.

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[7] In Opinion No. 740-A, issued November 7, 1975, the Commission denied rehearing. (A. 46.) On January 19, 1976, the Commission issued Opinion No. 740-B dealing with issues not involved in this petition. (A. 70.)

[8] Jurisdiction was based upon Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

On October 18, 1976, the Tenth Circuit issued its initial decision in which it reversed the Commission.[9] (A. 81.) On petitions for rehearing by both United and the Commission, the court on October 18, 1977, withdrew and vacated its first opinion and judgment. (A. 92-93.)

On February 9, 1978, the court, with one judge dissenting, entered its opinion and judgment on rehearing reaching the same result as in its previous opinion. The majority held that since production had ceased in 1966 from all gas reservoirs then known to exist, "there was an abandonment under Section 7(b) of the Natural Gas Act which does not render the issue within the expertise of the Commission." (O. 9.) Judge Holloway dissented on the ground that the Section 7(b) procedures are mandatory.[10] (O. 12-15.)

REASONS FOR GRANTING THE WRIT

I. THE RULING OF THE COURT BELOW IS IN CONFLICT WITH THE PLAIN TERMS OF THE STATUTE AND WITH THE DECISIONS OF THIS COURT.

A. Section 7(b) Unambiguously Requires a Commission Hearing, a Specified Finding and Commission Approval Before Certificated Natural Gas Service Can Be Abandoned.

The terms of the statute are plain. Section 7(b) provides without qualification that there shall be no abandonment without permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission as defined in that section.

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[9] McCombs v. FPC, 542 F.2d 1144 (10th Cir. 1976).

[10] On April 4, 1978, the court denied petitions by United and the Commission for rehearing and suggestions for rehearing in banc. (A. 95.)

B. The Decisions of this Court Confirm that Commission Approval Pursuant to Section 7(b) is a Mandatory Prerequisite to Abandonment.

This Court has consistently held that abandonment of certificated natural gas service can be effected only upon compliance with the provisions of Section 7(b). As early as its decision in *Atlantic Refining Co.* v. *Public Service Commission of New York,*[11] this Court held that once a gas supply is dedicated to interstate commerce, "there can be no withdrawal of that supply from continued interstate movement without Commission approval."[12] In *United Gas Pipe Line Co.* v. *FPC,*[13] this Court held that for abandonment, "[t]he statutory necessity of prior Commission approval, with its underlying findings, cannot be escaped."[14] In its recent decision in *Southland Royalty, supra,* the Court held:

> Once the gas commenced to flow into interstate commerce from the facilities used by the lessees, § 7(b) required that the Commission's permission be obtained prior to the discontinuance of 'any service rendered by means of such facilities.'[15]

The reason for the Court's consistent adherence to this principle is clear. The Commission's authority to permit or withhold abandonment has always been recognized as a key element in the "comprehensive and effective regulatory scheme"[16] established by the Nat-

[11] 360 U.S. 378 (1959).

[12] *Id.* at 389.

[13] 385 U.S. 83 (1966).

[14] *Id.* at 89.

[15] 46 U.S.L.W. at 4540-41.

[16] Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Indiana, 332 U.S. 507, 520 (1947).

ural Gas Act. For example, in *Sunray Mid-Continent Oil Co.* v. *FPC,*[17] this Court held that the Commission was empowered to require producers to accept certificates of unlimited duration as a condition to their commencing to sell gas in interstate commerce. The Court reasoned that, if natural gas companies were able to limit the duration of the service obligation they undertook, it would undermine the Commission's authority to control the terms of that service. It was essential for the Commission to be able to ensure that natural gas producers could not cease certificated service except on the terms provided in Section 7(b).

In *Sunray,* this Court discussed the very situation that has arisen in this case. In so doing, it made it clear that Section 7(b) hearings and findings are necessary prerequisites to abandonment, even though there has been a cessation of production from the reserves known to exist:

> It might be observed that in these cases the Commission issued certificates without time limitations. *Thus if the companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under § 7(b). The Commission thus, even though there may be physical problems beyond its control, kept legal control over the continuation of service by the applicants.*[18]

The holding of the court below is in direct conflict with this statement.

In *Southland Royalty, supra,* the Court held that abandonment authorization was necessary before de-

[17] 364 U.S. 137 (1960).

[18] 364 U.S. at 158n. 25 (emphasis added).

liveries of gas in interstate commerce could cease despite the expiration of the lease of the producer to whom the certificate had been issued. The decision emphasizes the importance attached by this Court to insuring that the Commission may "control both the terms on which a service is provided to the interstate market and the conditions on which it will cease." [19]

In short, this Court has made it clear that Section 7(b) is a key provision in the regulatory structure established by the Natural Gas Act, because it is Section 7(b) that assures that no certificated interstate natural gas service is abandoned without the Commission's express approval.[20] Accordingly, this Court's

[19] 46 U.S.L.W. at 4540. Other decisions of lower courts are in accord with this Court's in holding that Section 7(b) Commission approval is necessary for abandonment. *E.g.*, Reynolds Metals Co. v. FPC, 534 F.2d 379, 384-85 (D.C. Cir. 1976); Farmland Industries, Inc. v. Kansas-Nebraska Natural Gas Co., 349 F. Supp. 670, 677 (D. Neb. 1972), *aff'd*, 486 F.2d 315 (8th Cir. 1973); J. M. Huber Corp. v. FPC, 236 F.2d 550, 558 (3d Cir. 1956), *cert. denied*, 352 U.S. 971 (1957).

[20] As noted in Sunray Mid-Continent Oil Co. v. FPC, *supra* at 141-42, Section 7(b) of the Natural Gas Act "follows a common pattern in federal utility regulation." Section 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18), similarly provides that "no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment." Like the decisions under Section 7(b), the decisions under this provision uniformly hold that strict compliance with the statutory requirements is necessary to effect an abandonment and that only the Commission may in the first instance determine whether an abandonment is consistent with the present or future public convenience and necessity. Smith v. Hoboken R.R., Warehouse & S.S. Connecting Co., 328 U.S. 123, 129-30 (1946); Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 144-46 (1946); ICC v. Chicago, R.I. & Pac. R.R., 501 F.2d 908, 913-14 (8th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975); Meyers v. Jay Street Connecting R.R., 259 F.2d 532, 536 (2d Cir. 1958); ICC v. Baltimore & A. R.R., 398 F.Supp. 454, 461 (D.Md. 1975), *aff'd*, 537 F.2d 77 (4th Cir.), *cert. denied*, 429 U.S. 859 (1976).

decisions have made it clear that the Section 7(b) requirements are mandatory. The lower court's ruling, which holds to the contrary, is in conflict with these decisions.

C. The Decision Below Invades the Commission's Jurisdiction and Undermines the Commission's Authority to Administer the Natural Gas Act Effectively.

The court below held that the Section 7(b) requirements can be bypassed when the known facts make it appear that there is no more gas available from a particular tract. However, the statute expressly allocates to the Commission—not the courts—the responsibility to make the factual determination under which an abandonment will be permitted. As Judge Holloway pointed out in his dissent, the majority holding is "directly contrary to the plain terms of § 7(b)." (O. 12.)

> It is the *Commission* that must make the required findings and give approval before abandonment is legally effected, and not private parties by their agreement on the facts as to depletion and their consent to discontinuation of service. Nor does the determination by another tribunal that abandonment has occurred, as a matter of law, satisfy § 7(b).[21]

The majority opinion of the court below undermines the Commission's authority to control the terms and conditions upon which gas producers may terminate certificated natural gas service. For in view of the

[21] O. 13 (emphasis in original).

court below, the cessation of production from the known reserves on dedicated acreage would automatically result in an abandonment—and hence, the termination of the Commission's jurisdiction—without any finding or approval by the Commission. This would seriously impair the Commission's ability to carry out its statutory responsibility of assuring "an adequate and reliable supply of gas at reasonable prices."[22] The Commission would be left without the means to confirm that the producer did all that was required to maintain production from the old reserves. Similarly, the Commission would be denied the opportunity to determine how likely or unlikely was the possibility of production from the deeper horizons in light of geological information available at the time production from the shallow reserves ceased.[23]

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[22] California v. Southland Royalty Co., *supra* at 4540.

[23] The court below quoted extensively (O. 6-7) from the opinion it had previously withdrawn. The excerpts quoted, although not part of the court's holding, contain the suggestion that abandonment was effected under Section 7(b) when the Secretary of the Commission sent certain letters to the producers. The letters themselves, which were never made part of the record, are set out in their entirety in the Appendix. (A. 97-98, 100-01.) But they clearly could not have effected a Section 7(b) abandonment. They were simply inquiries from the administrative officer of the Commission prompted by the fact that the producers were reporting no deliveries from the dedicated acreage. Actions by the Secretary of the Commission are not binding; rather, only the institutional decisions of the agency—*i.e.*, decisions by a majority vote duly taken—are entitled to legal significance. Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 146 (1946) (action by Secretary of Interstate Commerce Commission not binding upon the Commission); Minneapolis & St. Louis R.R. v. Peoria & Pekin Union Ry. Co., 270 U.S. 580, 585 (1926) (action by Chairman of Interstate Commerce Commission not binding upon the Commission); Public Serv. Comm'n of New York v. FPC, 543 F.2d 757, 776-77 (D.C. Cir. 1974) (only

The majority opinion of the court below seems to assume that if an abandonment application had been brought after the old reservoirs ceased to produce but before the new production was established, the Commission would have been compelled to authorize abandonment. But this is not so. A similar situation was recently before the Commission in *Texaco, Inc., et al.*, FERC Docket Nos. G-8820, *et al.* There the Commission refused abandonment because the producer did not show that the lease had been explored to a point such that a definitive finding could be made that no additional gas reserves could be expected to be found through further exploratory efforts.[24] In holding that the cessation of production in and of itself effected abandonment, the court below would preclude the Commission from considering the possibility of production from deeper but untested reservoirs in making its determination under Section 7(b) whether "the available supply of natural gas is depleted."

Since the producers never sought Commission abandonment authorization here, the Commission never had the chance to make any evaluation whether the reserves were in fact exhausted or whether there might be additional reservoirs at lower depths. Indeed, because there now *is* production from deeper reservoirs, it is clear that the lease was *not* exhausted in 1966. It is indeed ironic that the court below relied heavily upon the assumption that the Commission would have been com-

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institutional decisions of Federal Power Commission enttiled to legal significance). Moreover, the letters do not even approach fulfillment of the hearing and finding requirements of Section 7(b).

[24] Order Granting Petition for Reconsideration and Modifying Prior Order, issued November 1, 1977, mimeo at 3.

pelled to make a finding that is now known to be incorrect.[25]

In any event, Section 7(b) expressly charges the *Commission* with the responsibility of determining whether "the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted." By making its own finding on abandonment, the court below not only impermissibly usurped the Commission's responsibility expressly conferred under Section 7(b), but it also exceeded the bounds of its reviewing authority under Section 19(b) of the Act.[26]

If allowed to stand, the decision of the court below would create considerable uncertainty as to whether abandonment of particular acreage has occurred or not. Abandonment would not be dependent upon a Commission order—a readily identifiable point of reference—but upon the actual or assumed depletion of the dedicated reserves. It would often be unclear whether a particular set of facts resulted in abandonment. For example, the court below emphasized the five-year period that had elapsed between the date of the last production from the shallow reserves and the new production from the deeper horizons. If this is a factor, it introduces an additional element of uncertainty, since

[25] The decision below is ironic in other respects as well. Although the producers here had an opportunity to seek abandonment once the shallow reserves ceased to produce, they chose not to do so. Now that production has been restored, it is clear that abandonment is not warranted. However, the lower court's decision places the burden for failure to comply with the Section 7(b) requirements, not upon the producers who omitted to comply with them, but upon the interstate consumers for whose protection they were enacted.

[26] FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331-34 (1976).

it is unclear how long the interval must be before the abandonment is effected.

Moreover, the lower court's decision deprives other parties (*e.g.*, pipeline purchasers and gas consumers) of the right to be heard in determining whether abandonment should be granted. Indeed, the power to effect abandonment would be to a large extent within the control of the producer. This is contrary to the mandate of Section 7(b) and the decisions of this Court.

II. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF THE FIFTH CIRCUIT IN MITCHELL ENERGY CORP. v. FPC.

In *Mitchell Energy Corp.* v. *FPC*,[27] the Fifth Circuit, upholding the Commission, ruled that gas from reservoirs not known to exist at the time of the original certificate was nevertheless dedicated to interstate commerce and subject to the Section 7(b) abandonment requirements. The court held that since all available gas in the field was subject to the producer's certificate and the service obligation related thereto, "until relieved of that obligation by appropriate action of the Commission, Mitchell must continue to put in interstate commerce all the gas produced" from the field.[28]

The decision below, in holding that the deeper reservoirs were not subject to the Section 7(b) abandonment requirements, is in conflict with *Mitchell Energy*. The fact that in *Mitchell Energy* the new production was discovered before the original production ceased, rather than afterwards, has no logical bearing on the question whether a Section 7(b) Commission proceed-

[27] 533 F.2d 258 (5th Cir. 1976).

[28] *Id.* at 261.

ing is a prerequisite to release of the deeper reserves from commitment to interstate commerce.

CONCLUSION

For all of the reasons set forth above, United respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Tenth Circuit in this case. Moreover, because the decision below is so clearly at odds with the decisions of this Court on the interpretation of Section 7(b) of the Natural Gas Act, United requests that it be summarily reversed and the case remanded for determination of the issues not yet decided.

Respectfully submitted,

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July 3, 1978

APPENDIX

OPINION OF THE COURT OF APPEALS
AND
SECTION 19(b) OF THE NATURAL GAS ACT

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 75-1829

BILLY J. MCCOMBS, R. JAMES STILLINGS, d/b/a GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORPORATION, E. I. DU PONT DE NEMOURS & COMPANY, and BILL FORNEY,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, formerly known as FEDERAL POWER COMMISSION,

Respondent,

UNITED GAS PIPE LINE COMPANY,

Intervenor.

Opinion on Rehearing on Petition for Review of Orders of the Federal Power Commission

(February 9, 1978)

Before SETH, HOLLOWAY and BARRETT, Circuit Judges.

BARRETT, Circuit Judge: These proceedings come before us for rehearing involving a review of opinions rendered by the Federal Power Commission (FPC) finding that the petitioners (McCombs Group) had violated two sections of the Natural Gas Act, 15 U.S.C. §§ 717f(b) and 717f(f) by failing to deliver natural gas to United Gas Pipe Line Company (United) under a producer's certificate authorizing the sale and continued sale of gas in interstate commerce. The pivotal dispute is whether the certificate was in force and effect or whether it had been abandoned prior to these proceedings. The FPC found that there had been no aban-

donment. In *McCombs* v. *Federal Power Commission*, 542 F.2d 1144 (10th Cir. 1976), authored by Judge Seth, the orders of the Commission involved here were set aside. However, this court granted the Commission's petition for rehearing. Thereafter, on October 18, 1977, this court directed and ordered that the opinion and judgment of October 18, 1976, *supra*, be withdrawn and vacated. We will refer to and quote from the prior opinion which has been vacated and withdrawn, however, inasmuch as it is reported in 542 F.2d 1144, *supra*.

In 1953, the leaseholders-producers of the Butler B lease covering a 163 acre tract situate in Karnes County, Texas, entered into a Gas Purchase Contract with United whereby the producers agreed to sell to United all natural gas produced then or thereafter from the tract. The producers applied to the FPC for producer certificates which were granted on December 8, 1954, authorizing the sale of the natural gas in interstate commerce.

The Butler B lease was assigned on various occasions prior to June 19, 1963, when the FPC terminated the 1954 certificates and issued a new certificate authorizing one H. A. Pagenkopf, then the Butler B lease assignee, to continue the service. This operator assigned the Butler B lease to one Louis H. Haring (Haring), et al., effective March 1, 1966. Haring appointed Bay Rock Corporation (Bay Rock) to operate the properties. At that time one well only had been completed on Butler B at a depth of 2,900 feet. It was not then producing. Haring-Bay Rock attempted to reestablish production from this well but those efforts failed for the most part and all production from the well and the lease terminated on May 28, 1966.

On December 5, 1966, Haring and Bay Rock informed United that production had ceased, that the gas reserve was depleted from the well and that there was no gas available for sale at that time. No deliveries of gas had been made to United since September 16, 1966. Following the notification that gas from the well was depleted, United

wrote Bay Rock that it planned to remove its measuring station which had been used to measure gas delivered to it from the well on the Butler B lease but that if, at some future date, further gas should become available from the properties subject to the 1953 contract, United should be informed so that it could arrange to reinstall the measuring equipment. United then removed the measuring equipment. Haring testified that he then considered the 1953 contract terminated.

Haring thereafter assigned his working interest rights, as successor lessee, to certain sands or reservoirs between depths of 8,700 to 9,700 feet. By means of unitization, the McCombs Group (Group) acquired the right to drill into these deeper depths involving the Butler B lease and an adjoining tract known as the Butler A lease, consisting of some 150 acres. Thereafter, the Group drilled and completed four producing gas wells from the deeper depths. One other company, National Exploration Company (National) which had previously acquired the Haring working interests in the west 50 acres of the Butler B lease covering depths of 4,115 feet to 8,700 feet had completed two producing gas wells. United contacted National in April of 1972 relative to purchasing the gas from these two wells. National then first became aware, in examining title documents in anticipation of sale of the gas, of United's 1953 purchase contract. National informed United that the gas from its two wells may be subject to United's 1953 Gas Purchase Contract. It was then that United undertook a title search concerning the Butler B tract. In May, 1973, United learned of its interest under the 1953 contract.

Haring did not at any time inform the Group of United's 1953 Gas Purchase Contract. He considered that contract terminated when production ceased from the single producing well on May 26, 1966. When he transferred his working interest rights to the deeper horizons in the Butler B lease to the Group, Haring did not believe that United had any further right or claim to gas which may be there-

after produced from the lease. The Group, before drilling, relied upon a 1967 title opinion which did not reflect any interest which United might have in the Butler B tract. After the Group realized production from its first well drilled on the Butler A tract in 1971, it contacted United, together with other prospective gas purchasers, relative to negotiations for sale of the gas. United wrote the Group on November 19, 1971, inquiring with regard to how the Group had acquired its interests in the leases. There is nothing in the record which casts any light on the negotiations. However, the Group did obtain a new title opinion on December 7, 1971, which for the first time disclosed to the Group United's 1953 Purchase Contract relating to the Butler B lease. Thereafter, in February, 1972, the Group discovered commercial gas from another well drilled on the Butler A tract. A title opinion of May 31, 1972, did not disclose any interest of United therein. In June of 1972, the Group concluded successful negotiations whereby it agreed to sell all of the gas it purchased from the Butler A and B leases to E. I. duPont deNemours & Company for industrial uses in *intrastate* commerce.

The Group successfully completed two more gas wells on the unitized tracts. Thereafter, on June 6, 1973, United notified the Group that it claimed all of the gas being produced from these tracts under and by virtue of its 1953 Gas Purchase Contract. The Group thereupon initiated a declaratory judgment action in the district court of Karnes County, Texas, against United. The action was removed to federal district court. On October 9, 1973, United filed a complaint with the FPC. Our reported opinion in *McCombs v. Federal Power Commission, supra,* detailed those proceedings leading to the Commission's adoption of the administrative law judge's conclusion that "the service authorized and the gas supply dedicated [under the original certificate involved here] include any and all gas produced from the Butler B acreage" and that, consequently, the intrastate sale to duPont was violative of the Natural

Gas Act. The administrative law judge further found that however negligent United may have been in asserting its rights under the 1953 Gas Purchase Contract and however innocent the Group may have been, that, notwithstanding, the Group should be ordered to cease and desist from continuing sales to duPont.

The basic matter for our determination of this rehearing relates to the issue of abandonment. The Commission held that there can be no abandonment of a certificate authorizing interstate service absent strict compliance with the requirements of petition, notice, hearing and establishment of cause for abandonment as required under 15 U.S.C.A. § 717(b) and § 717f(b).

Additional facts relating to the matter of abandonment set forth in our reported opinion in *McCombs v. Federal Power Commission, supra,* are appropriate here:

> To consider again some of the facts outlined above as they relate to this issue, the one producing gas well on the Butler B lease ceased producing early in 1966. The lease was assigned by Pagenkopf effective in March 1966, and the assignee, Haring, attempted to work over the well. During this work, about 3,000 Mcf was produced, but all production again ended in May 1966. The operator for Haring advised the gas purchaser, United, in December 1966 that the well was depleted. United thereafter in 1966 removed the equipment it had connected to the well. Thus, the only producing gas well was abandoned in the fall of 1966. The operator and the purchaser recognized that there could be no more gas delivered from the well. This was a physical fact beyond the control of either of them, and they recognized the realities of the situation. The operator or owner had tried to restore production but was unable to do so. The sellers and buyers wished to continue the sale and purchase of gas but could not do so. The record does not show that any gas was ever pro-

duced thereafter from this original well. The witness Haring who was the owner who attempted the workover, and who was a petroleum geologist, testified:

> "Certainy I was not aware of the gas reserves at deeper levels when the gas production ceased in 1966, and, as far as I know, neither United nor anyone else was aware of its existence."

In August 1968, the FPC wrote a letter to Pagenkopf suggesting that he file an application for abandonment. By an undated letter the Commission made a similar suggestion to the operator for Pagenkopf's successor, Haring. The FPC thus twice recognized that there had been no production for an extended time, and recognized that the abandonment should be formalized for its records. This must be acknowledged as a recognition by the Commission that there was in fact an abandonment, but there was something needed for the record. The records of the FPC as to this matter have apparently been destroyed under its procedures; consequently, it is not known what they may have indicated as to abandonment. The Commission in Opinion No. 740 in footnote 2 states as to the original proceedings for certification: "Our records indicate that Docket Nos. G-2997 and G-2998 were destroyed in 1964." It is apparent however from the testimony that no operator or owner filed a formal application to abandon.

542 F.2d at p. 1148.

In that same opinion we further observed and held:

> Thus we have a situation where there was an abandonment as a recognition of the indisputable physical facts beyond anyone's control. The Commission participated in this recognition as there were at least two suggestions by the Commission that someone file something to tidy up the records. These letters from

the Commission must be taken, in view of the destruction of the supporting records, to be an acknowledgment that there was an abandonment. It is difficult to see how a formal application, and a decision by the Commission could have added anything to these letters. In these circumstances, we must hold that there was an abandonment which was recognized by the Commission, and its jurisdiction ended.

Thus we must hold as a matter of law that there was an abandonment sufficient under Section 7(b) of the Natural Gas Act. This being a matter of law, we do not consider it within the expertise of the Commission.

The "abandonment" we refer to is that contemplated under Section 7(b) of the Act, as above indicated. This is the only "abandonment" which is applicable to these circumstances. Section 7(b) refers to "service rendered," and the ordering of further "service" would have been a futile gesture. The seeking of an application by the Commission was a recognition of the fact that no more gas could be delivered from the only gas well, and that the "service rendered" had long since ceased contrary to everyone's wishes. This action by the Commission thus could only have reference to Section 7(b).

542 F.2d at pp. 1148, 1149.

We know of no opinion dealing with a factual situation similar to that presented here. In light of the facts and circumstances contained and reflected in this record, we hold that the Commission erred in concluding that the cessation of gas production from the Butler B leasehold on May 28, 1966, did not constitute an abandonment under Section 7(b) of the Natural Gas Act.

I.

FPC contends that § 7(b) of the Natural Gas Act [15 U.S.C.A. § 717f(b)] is explicit in requiring that prior Com-

mission approval must be obtained by any natural gas company before it can abandon any "facilities," or "service" involving the transportation and resale of gas dedicated by certificate to sale in interstate commerce. The full text of § 7(b) is as follows:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that present or future public convenience or necessity permit such abandonment.

To be sure, just as we previously recognized in *McCombs v. Federal Power Commission, supra,* the decisions are abundant and clear on the point that in those cases where the supply of natural gas is not depleted, the service must be continued via the facilities authorized. Obviously, there could be no finding by the Commission that the available supply of natural gas has been depleted under such circumstances. *United Gas Pipe Line v. Federal Power Commission,* 385 U.S. 83, 87 S.Ct. 265, 17 L.Ed.2d 181 (1966); *Sunray Mid-Continent Oil Co. v. Federal Power Commission,* 364 U.S. 137, 80 S.Ct. 1392, 4 L.Ed.2d 1623 (1960); *Sun Oil Co. v. Federal Power Commission,* 364 U.S. 170, 80 S.Ct. 1388, 4 L.Ed.2d 1639 (1960); *Atlantic Refining Co. v. Public Service Commission of New York,* 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed.2d 1312 (1959); *Phillips Petroleum Co. v. Federal Power Commission,* 556 F.2d 466 (10th Cir. 1977); *Farmland Industries, Inc. v. Kansas-Nebraska Natural Gas Co.,* 486 F.2d 315 (8th Cir. 1973); *Valley Gas Co. v. Federal Power Commission,* 159 U.S.App.D.C. 311, 487 F.2d 1182 (1973); *J. M. Huber Corp. v. Federal Power Commission,* 236 F.2d 550 (3rd Cir. 1956); *Panhandle Eastern Pipe Line*

Co. v. Michigan Consolidated Gas Co., 177 F.2d 942 (6th Cir. 1949). These decisions support the proposition advanced by this court in *Harper Oil Co. v. Federal Power Commission,* 284 F.2d 137 (10th Cir. 1960):

> It would thus seem clear that once an independent producer of gas has dedicated his production to interstate commerce and thereby has come under the jurisdiction of the Commission, he remains thereunder so long as production continues. [Citing to *Sun Oil Co. v. F. P. C.,* 364 U.S. 170, 80 S.Ct. 1388, 4 L.Ed.2d 1639.]
>
> 284 F.2d at p. 139.

We hold that, as a matter of law, based upon the facts and circumstances of the instant case, there was an abandonment under Section 7(b) of the Natural Gas Act which does not render the issue within the expertise of the Commission. Abandonment in the context of the facts and circumstances of this case cannot be equated with a voluntary "giving up" of valuable rights and/or property in the usual sense of relinquishment or surrender. Rather, the abandonment here presents the very practical recognition that there was no *service* to be rendered following the depletion of gas on December 5, 1966, from the Butler B leasehold. All parties recognized that for a period of five years thereafter no *service* could be rendered because the known gas reserves were depleted. These *facts* were acknowledged by all of the parties, including the Commission. Thus, the only known reserves of natural gas for which applications for certification had been made and authorized had been depleted. With its depletion and the subsequent five year period of non-service, there was no need for the formality of a Section 7(b) hearing. This is so because, in our view, all parties, including the Commission, considered that there were no gas reserves available following cessation of production and the subsequent efforts to restore production by workover methods in order to *service* the

public consumer, and, of course, to profit from the discovery and sale.

At oral argument, the FPC contended that the certificate originally granted authorized and dedicated all gas without regard to depth or sand/reservoir limitations, to sale in interstate commerce and that there cannot be an "abandonment in fact." The FPC further argued that its expertise is required as a prerequisite to any abandonment in that a formal hearing may or might see the presentation of expert evidence by the Commission that further reserves of natural gas are likely to exist at other depths, zones, reservoirs, etc., underlying the subject leasehold. Nevertheless, counsel for the Commission did acknowledge that in factual instances such as those presented here, proof of depletion and efforts to resurrect production by workover attempts have been acceptable evidence of depletion of gas for purposes of abandonment orders under Section 7(b).

The Commission urges that *Mitchell Energy Corp. v. Federal Power Commission,* 533 F.2d 258 (5th Cir. 1976) controls. That opinion held that although the 1949 contract between the gas producer and gas purchaser which dedicated all gas from the seller's interest in leaseholds and units in a particular field had expired in 1973, that nevertheless the successor in interest to the original producer was bound to dedicate the gas to interstate commerce because the successor assumed, as a matter of law, the original producer's obligations. That simply is not the case before us here. There had been no cessation of production in *Mitchell* and certainly no *depletion* of known reserves. *Mitchell* is not at variance with those decisions we have heretofore cited for the proposition that once natural gas is dedicated to interstate commerce it cannot be withdrawn from service in interstate movement without prior Section 7(b) FPC approval.

Our holding that strict compliance with the non-abandonment language of 15 U.S.C.A. § 717f(b), *supra,* does not

control under the facts and circumstances here is, we believe, buttressed by certain language contained in *Union Oil Co. of California v. Federal Power Commission,* 542 F.2d 1036 (9th Cir. 1976). At issue there was the FPC requirement that all producers of natural gas dedicated to interstate commerce annually submit a Form 40 containing detailed information about their natural gas reserves. The Court rejected the FPC contention that the reporting burden on the producers was outweighed by the Commission's need to have the reservoir data. The Court stated, in pertinent part:

> There is no evidence from which the FPC could conclude that the data required on Form 40 on a by reservoir basis were or could easily become available. The only evidence is to the contrary . . . Although there was no evidence before the Commission to contradict the unanimous statements of the producers that natural gas reserve data are not kept by them on a 'by reservoir' basis and that such data would be extraordinarily expensive to obtain, the Commission majority found that '[T]here is little doubt that the information required . . . is possessed by the respondents.' . . . This assertion is simply wrong . . . The Commission's factual determination that the data required are available is not supported by any evidence, much less by substantial evidence.
>
> 542 F.2d at p. 1042.

We conclude that the abandonment of the service in the instant case was accomplished, as a matter of law, when all of the parties recognized that the then known natural gas reserves were depleted in 1966 followed by failure to provide any service under the certificates for a period of five years during which time there was no evidence of other estimated gas reserves recoverable from the subject leaseholds.

We direct that all orders included in the Commission's Opinions Nos. 740, 740-A, and 740-B be set aside. We remand with directions that other pending proceedings in the Commission's Docket No. CP74-94 based on such orders be terminated and that the proceedings be dismissed.

IT IS SO ORDERED.

HOLLOWAY, Circuit Judge, dissenting:

I respectfully dissent. While the equities favor the McCombs Group, duPont and National, usual contract rules and equitable considerations do not control in this proceeding under the Natural Gas Act, in my opinion. Instead, there are mandatory statutory requirements on abandonment of service which were imposed to protect the public interests recognized by the Act, *Sunray Oil Co. v. FPC*, 364 U.S. 137, 143, 80 S.Ct. 1392, 4 L.Ed.2d 1623, and these provisions convince me that we should affirm the basic holding of the Commission in this case.[1]

The majority opinion reasons (p. 1380) that: there was an abandonment in fact after all production ceased in 1966 on the Butler B lease from then known productive formations, as recognized by the Commission and the parties; that with this recognized abandonment the Commission's jurisdiction ended; and that this abandonment was sufficient, as a matter of law, under § 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), and this being a matter of law, it was not within the expertise of the Commission.

To me these conclusions are directly contrary to the plain terms of § 7(b). The statute could hardly be clearer in saying that:

[1] The majority opinion does not reach other issues raised such as the propriety of the ruling on dissolution of the units and of the order requiring repayment to United of quantities of gas sold to duPont in the intrastate transaction, and the failure to sustain the motion challenging jurisdiction as to duPont. Thus it is unnecessary for me to address these issues. I will consider only the holding of the majority on the central abandonment issue.

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, *without the permission and approval of the Commission first had and obtained,* after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. (Emphasis added).

It is the *Commission* that must make the required findings and give approval before abandonment is legally effected, and not private parties by their agreement on the facts as to depletion and their consent to discontinuation of service. Nor does a determination by another tribunal that abandonment has occurred, as a matter of law, satisfy § 7(b). As the Supreme Court pointed out in *Sunray*, supra, 364 U.S. at 158 n.25, 80 S.Ct. at 1404:

> [25] It might be observed that in these cases the Commission issued certificates without time limitations. *Thus if the companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under § 7(b).* The Commission thus, even though there may be physical problems beyond its control, kept legal control over the continuation of service by the applicants. (Emphasis added).

See also *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 389, 79 S.Ct. 1246, 3 L.Ed.2d 1312; *Phillips Petroleum Co.* v. *FPC*, 556 F.2d 466, 469 (10th Cir.); *Mitchell Energy Corp. v. FPC*, 533 F.2d 258, 261 (5th Cir.).

The majority lays stress on the fact that production from the known reserves underlying the Butler lease was depleted in 1966, that there was testimony that neither United, the producer, nor anyone else was then aware of deeper reserves, and that as a practical matter there was no service that could be rendered thereafter from that lease. And, as the majority says, counsel for the Commission conceded that proof of such depletion and of failure of efforts to re-establish production has been accepted by the Commission in § 7(b) proceedings as a basis for permission for abandonment. Further the Commission did twice write suggesting that an application for abandonment be filed, which action the majority interprets as Commission recognition that there was in fact an abandonment.

However, there were other reserves as is now known, and United did state that while it would remove its metering equipment in 1966, it would reinstall such equipment whenever further gas might be delivered under the contract. (J.A. 137). In view of these circumstances it may not be quite certain what would have happened if application for a complete abandonment had been made, notice thereof had been given by publication,[2] and a final abandonment approval had been considered by the Commission. But, in any event, permission for abandonment of all service was for the Commission and we cannot make the findings and give the approval which Congress deemed it nec-

[2] The Commission's regulations required notice by publication and mailing to States affected by the application, see 18 CFR § 157.9 (January 1, 1969), and permitted petitions for interventions by persons desiring to participate. See 18 CFR § 157.10 (January 1, 1969). Pipeline purchasers have been permitted to intervene in such proceedings. See *e. g., Transcontinental Gas Pipe Line Corp. v. FPC*, 160 U.S.App.D.C. 1, 2-3, 488 F.2d 1325, 1326-27, cert. denied sub nom. *Natural Gas Pipeline Co. v. Transcontinental Pipe Line Corp.*, 417 U.S. 921, 94 S.Ct. 2629, 41 L.Ed.2d 226.

essary for the Commission to make. *Sunray*, supra, 364 U.S. at 142, 80 S.Ct. 1392.

The Commission noted in its Opinion 740 that the original 1953 contract covered merchantable natural gas produced from all wells now or hereafter drilled during the 10-year term of that contract (later extended to 1981) on specified leaseholds including the Butler B tract, and further noted that there was no mention of any particular depths in that contract. (J.A. 160-61). Further, the McCombs Group now does not contest the fact of delivery of gas from the Butler B lease to United.[3] Such delivery constituted both a sale under the contract and commencement of a "service" obligation in interstate commerce under the Act. *Phillips Petroleum Co. v. FPC*, supra, 556 F.2d at 469. As this delivery was made under a contractual dedication without limits as to depths, there was a dedication to interstate commerce of the underlying reserves in question, and the effort to resell the same gas amounted to an attempted abandonment, which could not be done without first obtaining approval of the Commission under § 7(b). Ibid.

For these reasons I would sustain the Commission's conclusion that the commencement of service completed dedication to United in interstate commerce and thereby invoked the protection of § 7(b). (J.A. 163). And concluding that procedures made mandatory by the Act have not been complied with, I must dissent.

[3] The McCombs Group says that the statement by United indicating that the record shows that gas was received by United from the Butler B lease should be read with some caution. The McCombs Group points to the absence of evidence in the original record that gas was actually delivered from the Butler B lease to United, but recognizes that United later presented some evidence on the point in subsequent proceedings before the Commission. The McCombs Group states that since it is not seeking merely a remand, it has not raised the delivery of Butler B gas to United as an issue in this review proceeding, except as evidence of the Commission's partiality toward United. (Reply Brief of McCombs Group, 2).

Section 19(b) of the Natural Gas Act. 15 U.S.C. § 717r(b) (1976):

(b) *Review of Commission order*

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the

additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

APPENDIX TO PETITION FOR CERTIORARI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-171

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

BILLY J. McCOMBS, R. JAMES STILLINGS, d/b/a GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORPORATION, E. I. du PONT de NEMOURS & COMPANY, BILL FORNEY, and FEDERAL ENERGY REGULATORY COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX *

* This volume contains all items required to be appended under Rule 23 of the Rules of this Court, except the opinion of the Court of Appeals and the text of Section 19(b) of the Natural Gas Act which are annexed directly to the Petition for Certiorari.

APPENDIX

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. CP74-94

UNITED GAS PIPE LINE COMPANY

v.

BILLY J. McCOMBS, R. JAMES STILLINGS d/b/a GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORPORATION, LOUIS H. HARING, JR., NATIONAL EXPLORATION COMPANY, E. I. DU PONT DE NEMOURS & COMPANY and BILL FORNEY

OPINION No. 740

Before Commissioners: JOHN N. NASSIKAS, Chairman; WILLIAM L. SPRINGER and DON S. SMITH.

Opinion and Order on Natural Gas Entitlements and Remanding Proceeding

(Issued August 20, 1975)

INTRODUCTION

1. At issue in this proceeding is the scope of a producer certificate which the Commission issued in Docket No. G-2998 late in 1954 in the wake of *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, decided June 7, 1954. While we affirm presiding Administrative Law Judge William C. Levy's conclusion in his Initial Decision issued April 26, 1974, that the successor-in-interest certificate which the Commission issued in Docket No. G-12694 requires the sale and delivery in interstate commerce of all of the natural gas which is produced from the so-called Butler B lease, we conclude, in addition, that during periods when portions of the Butler B lease are unitized with other leaseholds the certificate in the latter docket requires the interstate sale

and delivery of all of the natural gas which is produced from the respective gas units and is attributable to the Butler B lease, whether the gas is produced from the Butler B lease or from other leaseholds within the gas units. Specifically, that would be 42.9658% of the natural gas which is produced from McCombs-Butler Gas Unit No. 1, 52.0767% from McCombs-Butler Gas Unit No. 2 and 14.2045% from the unnamed gas unit designated by National Exploration Company (National Exploration).

2. While Judge Levy found that all of the respondents are violating Section 7 of the Natural Gas Act, as implemented, by "making unauthorized sales of . . . gas [produced from the Butler B lease] without the approval of the Commission," we refrain from making such a finding with respect to E. I. du Pont de Nemours & Company (du Pont) since du Pont has not been found to be a "natural gas company" and is the purchaser rather than a seller in the "unauthorized sales". Additionally, we refrain from reaching a similar conclusion with respect to National Exploration to the extent that we credit the production from its gas unit which it sold under emergency procedures against the volumes which it was required to sell under the certificate in Docket No. G-12694. Furthermore, we are satisfied that the foregoing violations of Section 7 commenced in such a manner and continued under such circumstances that we should not, in the exercise of our discretion at this time, transmit evidence concerning them to the Attorney General pursuant to Section 20(a) of the Natural Gas Act for possible criminal proceedings.

3. Finally, while Judge Levy ordered the respondents to "cease and desist the sales currently being made to the intrastate market of gas produced from the Butler B lease" and to file an application for a successor-in-interest certificate under § 154.92(d) of the Commission's Regulations Under the Natural Gas Act, we take the following more-assertive actions, instead:

(A) Order the respondents, other than du Pont, who are small producers, (a) to deliver to United Gas Pipe Line Company (United) in interstate commerce in compliance with the Commission's certificate in Docket No. G-12694, (b) and from the production from their respective gas units, (c) not less than all of the natural gas which is attributable to the Butler B lease, (d) such deliveries to commence 45 days after the date hereof, or as soon thereafter as United physically connects gathering facilities to receive the gas, (e) at interim rates which are equal to the maximum rates applicable to large producers in their situation, *i.e.*, the maximum area rate under Opinion No. 595 and the maximum national rate under Opinion No. 699, on the assumption that separate sales were made to United immediately upon the completion of each well from which the production is derived.

(B) Order the respondents to file within 45 days after the date hereof, a plan or plans under which United would be made whole for its entitlements from or attributable to the Butler B lease which were delivered to others, together with their evidence upon the matters to be considered at further hearings.

(C) Remand this proceeding to an administrative law judge for further hearings to determine the amounts of United's volumetric entitlements hereunder, to consider the foregoing plan or plans and to consider a rate or rates under which United would purchase its past and future entitlements from or attributable to the Butler B lease.

Background

4. On or about May 20, 1948, B. C. Butler, Sr., *et al.*, executed an oil and gas lease to W. R. Quin (the Butler B lease) covering approximately 163 acres (the Butler B tract) situate in what was then known as South Porter Gas Field and is now known as the McCaskill Field in Karnes County, Texas. Among other matters, the lease

authorizes the unitization of the leasehold or any portion of it and provides, in this connection, that the production of gas from "any portion of any such unitized area in which all or any part of the land described herein is embraced, shall have the same effect as though a well had been commenced or completed on the land herein described or production obtained under the terms hereof. The provisions hereof shall be construed as covenants running with the land." In other words, unitization would transform the leasehold into an undivided part of a larger whole.

5. Under a Gas Purchase Contract dated April 29, 1953 (the 1953 Gas Purchase Contract), Bee Quin, individually and as independent Executrix of the Estate of W. R. Quin, agreed to sell and deliver, and United agreed to purchase and receive "merchantable natural gas . . . produced from all wells now or hereafter drilled during the [10 year] term of this contract" on three specified leaseholds, including the Butler B tract, "and Seller's proportionate part of all merchantable natural gas produced from any well or wells located on any unit or units which include any part of said lands and leaseholds. . . ." The contract was amended on August 12, 1954, to provide for the possible construction of a gasoline plant in the area; on August 31, 1954, to provide for an increase in the production tax; and on September 7, 1954, to embrace additional leaseholds and provide for the sale of oil-well gas.

6. Following the June 7, 1954, *Phillips* decision, the Commission on July 16, 1954, issued Order No. 174 which was superseded by Order No. 174-A issued August 6, 1954,[1] promulgating regulations governing the filing of rate schedules and applications for certificates of public convenience and necessity under Section 7 of the Natural Gas Act by producers and gatherers of natural gas which were also

[1] We take official notice of Order Nos. 174 and 174-A which are not part of the record.

natural gas companies. Under the regulations, independent producers of natural gas which engaged in jurisdictional activities on or since June 7, 1954, were required to file their rate schedules and applications by October 1, 1954, and independent producers which proposed to initiate jurisdictional activities after the effective date of the regulations were required to make their filings 30 to 60 days before initiating those activities.

7. On September 23, 1954, Mrs. Quin filed applications in Docket Nos. G-2997 and G-2998 pursuant to Order No. 174-A for producer certificates.[2] On December 8, 1954, the Commission issued certificates in Docket Nos. G-2997 and G-2998 authorizing the sale, and the continued sale, respectively, of natural gas in interstate commerce as more fully described in the applications and exhibits.

8. On or about April 15, 1955, Mrs. Quin assigned her individual and fiduciary interests in the properties subject to the 1953 Gas Purchase Contract, as amended, to Alfred Morrison d/b/a Consolidated Petroleum Industries; and the latter, on or about March 27, 1957, reassigned such interests to others who authorized Hawn Brothers, a partnership, to operate the properties and make appropriate filings with the Federal Power Commission. On June 3, 1957, Hawn Brothers filed an application in Docket No. G-12694 for a successor producer certificate. In 1960 Mrs. Quin's former interests were again reassigned to H. A. Pagenkopf, *et al.* On February 14, 1961, H. A. Pagenkopf, Trustee, as operator, amended Hawn Brothers' application stating, among other matters:

> "The undersigned H. A. Pagenkopf, Trustee, acknowledges to the Commission that he has taken over

[2] Our records indicate that Docket Nos. G-2997 and G-2998 were destroyed in 1964. While United furnished purported copies of the applications therein, the authenticity and admissibility of those copies are at issue.

as operator of the properties as of the closing date of the Hawn Brothers operation and hereby adopts all previous applications, filing, contracts, rate schedules, tariffs and all other related matters made on the properties by his predecessor."

The Commission, by order issued June 19, 1963, terminated the certificates in Docket Nos. G-2997 and G-2998 and issued a certificate in Docket No. G-12694 authorizing H. A. Pagenkopf, Trustee, to continue the service which had been initiated by Bee Quin pursuant to authorization in Docket Nos. G-2997 and G-2998, as more fully described in the application.

9. In the meanwhile, on February 7, 1961, H. A. Pagenkopf, *et al.*, and United amended the 1953 Gas Purchase Contract to extend its term to February 7, 1981, and to fix prices, among others, of 14¢ per Mcf for the five years ending June 19, 1974, and 16¢ per Mcf for the remaining term, in both cases subject to readjustment.

10. On or about April 5, 1966, but as of March 1, 1966, H. A. Pagenkopf, *et al.*, assigned their interests (reserving certain production payments) in certain leaseholds, including the Butler B tract, to Louis H. Haring, Jr. (Haring), *et al.*, who, in turn, engaged Bay Rock Corporation (Bay Rock) as operator. Haring testified, in this connection, that the Butler No. 7 Gas Well on the Butler B tract at that time had been completed to a depth of 2,960 feet and had last produced in January 1966; that in April 1966 Bay Rock installed a compressor which caused it to produce for 10 days; and that Bay Rock then reworked the well obtaining about 3,000,000 cubic feet of gas until it finally quit on May 28, 1966. By letter dated May 9, 1966, Haring notified United of the assignment and the designation of Bay Rock as operator, stating that his group would "make an appropriate Certificate and Rate Schedule filing with the Federal Power Commission reflecting change in ownership of said

properties." Nonetheless, his group did not make such a filing. In August 1966 Bay Rock drilled Butler No. 8 Well which produced oil at a depth of 4,200 feet and thereby kept the Butler B lease alive.

11. United wrote to Bay Rock on December 1, 1966 stating that according to its records there had been no deliveries of gas under the 1953 Gas Purchase Contract since September 16, 1966. United inquired therein as to Bay Rock's plans, if any, for the resumption of deliveries, and indicated that it would blind plate its meter station at the delivery point so that it might discontinue changing its charts pending Bay Rock's advice. Bay Rock replied on December 5, 1966, stating that the wells were depleted "and there will be no other gas available at this time." United then acknowledged Bay Rock on December 7, 1966, advising that it would remove its metering equipment for use elsewhere, but that it would reinstall such equipment whenever Bay Rock might have further gas to deliver under the contract. Bay Rock did not seek or obtain Commission authorization under Section 7(b) of the Natural Gas Act to abandon its sale to United.

12. By letter dated June 23, 1969, United notified Haring that it would reset the price under the 1953 Gas Purchase Contract at 18.3¢ per Mcf for the five years beginning June 19, 1969, but that it had not prepared an agreement for this purpose in the absence of deliveries.

13. On or about November 1, 1971, Louis H. Haring, Jr., *et al.*, assigned a 75% interest (reserving a 25% overriding royalty interest) in the west 50 acres of the 163 acre Butler B tract from a depth of 4,115 feet to a depth of 8,700 feet to National Exploration [3] pursuant to a prior agreement

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[3] As is more fully discussed in Opinion No. 678 issued December 7, 1973 (*Transcontinental Gas Pipe Line Corporation*, Docket No. CP73-4), National Exploration is an affiliate of Elizabethtown Gas

under which the 50 acre interest was unitized by National Exploration with its interest in 302 adjoining acres, forming a 352 acre unit. On an areal basis in accordance with the 1953 Gas Purchase Contract, the 50 acre interest thereby became entitled to 14.2045% of the natural gas produced from any part of the unit, including the particular 50 acres, and the other 302 acres became entitled to 85.7955% of that gas, including the gas produced from the particular 50 acres. National Exploration was unaware at the time of the assignment of United's interest in the Butler B tract.

14. On or about October 22, 1971, Louis H. Haring, Jr., *et al.*, assigned a 72% interest (reserving a 28% overriding royalty interest) in the east 113 acres of the 163 acre Butler B tract from a depth of 6,500 feet to 8,653 feet to Billy J. McCombs.[4] On or about November 5, 1971, but effective November 1, 1971, Billy J. McCombs, Basin Petroleum Corporation and Corinthian Oil Corporation designated McCombs-Butler Gas Unit No. 1 embracing the east 113 acres of the Butler B tract and the adjoining 150 acre Butler A tract below a depth of 6,500 feet and above a depth of 8,640 feet, forming a 263 acre unit. On an areal basis, the Butler B tract thereby became entitled to 42.9658% of the

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Company (Elizabethtown). Among other policies, National Exploration sought to avoid the purchase of, and competition for, proven reserves. Instead, it sought to explore for and develop reserves which would be significant to Elizabethtown but too small to attract major producers.

[4] The so-called "McCombs Group" is not a formal business organization, but consists of persons who have an apparent common interest with that of Billy J. McCombs, at least for the purpose of this proceeding. While the record does not indicate clearly when and how all of these interests came into being, the McCombs Group includes respondents Billy J. McCombs, Basin Petroleum Corporation, David A. Onsgard, R. James Stillings d/b/a Gastill Company and the McCombs Group's operator, Bill Forney (Forney). It may now include, or may have once included, Corinthian Oil Corporation, which is not a respondent.

natural gas produced from the unit, and the Butler A tract became entitled to 57.0342%.

15. On or about April 1, 1972, Louis H. Haring, Jr., *et al.*, assigned a 70% interest (reserving a 30% overriding royalty interest) in the 163 acre Butler B tract below a depth of 8,700 feet and above a depth of 9,700 feet to Billy J. McCombs. On or about April 3, 1972, the McCombs Group (except for Forney) designated McCombs-Butler Gas Unit No. 2 embracing the 163 acre Butler B tract and the adjoining 150 acre Butler A tract below a depth of 8,700 feet and above a depth of 9,700 feet, forming a 313 acre unit. On an areal basis, the Butler B tract thereby became entitled to 52.0767% of the natural gas produced from the unit, and the Butler A tract became entitled to 47.9233%.

16. Relying upon a 1967 title opinion which failed to show United's possible interest in the Butler B lease, the McCombs Group in August and September 1971 drilled the Butler No. 1 Well in the Butler A tract which produced gas at the 8,060-8,075 and 8,318-8,328 feet depths.[5] The McCombs Group thereupon contacted United, among others, to negotiate a sale of that gas. By letter dated November 19, 1971, United inquired into the source of the McCombs Group's leases, and the parties take opposite positions as to whether the McCombs Group ignored or fully complied with that request. In any event, the negotiations extended into 1972 but did not materialize. As noted, McCombs-Butler Gas Unit No. 1 embracing the production depths of the Butler No. 1 Well was designated effective November 1, 1971, and a title opinion dated December 7, 1971, disclosed United's interest in the Butler B lease.

17. In February 1972 the McCombs Group drilled the Butler No. 2 Well in the Butler A tract which produced gas

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[5] About 14 months later in November 1972 the Butler No. 1 Well stopped producing at those depths and was recompleted to the 8,109-8,116 feet depth. It is currently shut in.

at depths embraced by McCombs-Butler Gas Unit No. 1 and at the 8,950-8,970 depths. As noted, McCombs-Butler Gas Unit No. 2 embracing the latter production depths of the Butler No. 2 Well was designated on April 3, 1972, but a title opinion dated May 31, 1972, failed to show United's possible interest in the Butler B tract. Forney testified, in this connection, that he was satisfied that United had released the 1953 Gas Purchase Contract because Haring had informed him in or about December 1971 that he, Haring, had a letter to that effect. In September 1972 the McCombs Group drilled the Butler No. 3 Well in the Butler B tract which produced gas at depths embraced by McCombs-Butler Gas Unit No. 1. Finally, in September and October 1972 the McCombs Group drilled the Butler No. 4 Well in the Butler A tract which produced gas at depths embraced by McCombs-Butler Gas Unit Nos. 1 and 2.

18. In the meanwhile, under a Gas Purchase Contract dated June 1, 1972, the McCombs Group dedicated and agreed to sell and deliver to du Pont all of its interest in its reserves underlying the Butler A and Butler B tracts, subject to unitization "so long as such action does not reduce the reserves dedicated to the performance of this Contract", and du Pont agreed to receive and purchase or pay for 85% of the McCombs Group's Delivery Capacity (a defined term), at a price equal to the higher of the "prevailing price" or $.35 per Mcf for the first four years, escalating at a rate of 1¢ per Mcf each fourth year, with a Btu adjustment. Thereafter, the McCombs Group sold and delivered gas to du Pont through Lo-Vaca Gathering Company for use in the Texas intrastate market.

19. Also, in the meanwhile, early in 1972 National Exploration drilled two gas producing wells within its allocated depths of the west 50 acres of the Butler B tract, among other wells in its unitized area, and United sought to purchase that gas in April 1972. In the course of preparing royalty division orders National Exploration learned

of United's possible interest and, in January 1973, so notified United. On January 18, 1973, United and National Exploration entered into an agreement under which the latter recognized United's 50/352 (14.2045%) claim to the gas produced from its unit, and United agreed not to intervene in Docket No. CP73-4.[8] Under a contract dated May 14, 1973, National Exploration commenced a 60-day emergency sale of natural gas to United pursuant to Order No. 418 at a price of 50¢ per Mcf, with provision for a one-year extension if a limited term certificate with pregranted abandonment could be obtained. Accordingly, from May through September 1973, National Exploration sold 2,412,459 Mcf of gas to United. Under a contract dated October 9, 1973, and commencing November 15, 1973, National Exploration began a 180 day sale of natural gas to United pursuant to Order No. 491-B at a price of 65¢ per Mcf.

20. Upon being notified by National Exploration in January 1973 of its possible interest in the Butler B gas, United undertook a title search which resulted in its notifying the McCombs Group and others on June 6, 1973, of its claim under the 1953 Gas Purchase Contract. Confronted by United's claim, the McCombs Group filed a lawsuit in the District Court of Karnes County, Texas, for a declaratory judgment that they were not contractually bound to deliver the Butler B gas to United and for other relief, and the lawsuit was removed by United to the United States District Court for the Western District of Texas. On October 9, 1973, United filed a Complaint in Docket No. CP74-94 asserting that the McCombs Group (other than Forney, who was made a respondent later), National Exploration and du Pont were failing and refusing to comply with the Commission's certificate in Docket No. G-12694, and asking that they be ordered to cease and desist from their unlawful diversions of the Butler B gas to the Texas intrastate market, that

[8] See footnote 3.

they be ordered to pay back the diverted volumes, and that they be directed to make future deliveries to United. After notice, the Commission, on November 27, 1973, set the matter to hearing and ordered the foregoing respondents to show cause (1) why they shouldn't be required to file an application for a successor certificate, (2) why they shouldn't be required to cease their intrastate sales, (3) why they shouldn't be required to repay to United volumes withheld from the interstate market and (4) why they shouldn't be held in violation of Section 7 of the Natural Gas Act.

21. By order issued December 12, 1973, the Commission denied motions to dismiss or defer action on the Complaint pending resolution of the litigation, stating (footnotes redesignated):

> "From an early date, this Commission has taken the view that there is a continuing obligation to perform 'service' imposed by the Act separate and apart from any contractual requirements.[a] This distinction between the concept of underlying 'service' to the public and the contractual means by which it is implemented is quite important to a proper understanding of primary jurisdiction. Under Section 7(b), the finding that the 'public convenience and necessity' does not permit abandonment is alone sufficient to require a continuation of service, the private contract notwithstanding.[b]

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[a] "*United Gas Pipe Line Co.*, 3 FPC 3, 9 (1942). This view has been ratified by the Supreme Court, *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960)."

[b] "Id. It should be noted here that it may not be necessary to abrogate any interpretation operating as a limitation on contract obligations since any extant obligation beyond such an interpretation of the contract is not contractual, but one imposed by the Natural Gas Act."

> Resolution of the private contract disagreement cannot by any means be said to be dispositive of the paramount issues of the public interest under Section 7. In fact, it is these same public interest considerations that make it incumbent upon this Commission to exercise its primary jurisdiction, as delegated to it by the Act, in order to secure an initial administrative judgment of whether or not service should continue pursuant to a certificate of public convenience and necessity, as issued and outstanding."

22. The hearing was held on January 10 and February 13 and 14, 1974; and, although the record consists of some 363 pages of transcript, 39 exhibits and one item of evidence by reference, it is insufficient for final disposition of this proceeding. Judge Levy issued an Initial Decision on April 26, 1974, and we have before us the briefs on exceptions and briefs opposing exceptions to that decision together with du Pont's renewal of a motion to dismiss the show cause order as to it, and United's answer to that motion.

Initial Decision

23. After reviewing the background of the proceeding and the positions of the parties, Judge Levy indicated that while States, municipalities and State commissions may file complaints under Section 13 of the Natural Gas Act, "persons" such as United may also file complaints under Section 1.6 of the Commission's Rules of Practice and Procedure. That provision was adopted, he said, pursuant to the Commission's authority under Section 16 of the Natural Gas Act to make rules to carry out the provisions of the Natural Gas Act.

24. Furthermore, he indicated, the Commission is not asserting jurisdiction to determine the contractual claims

of the parties to the gas produced from or attributable to the Butler B lease:

> "The obligation to continue service under Section 7 of the [Natural Gas] Act exists separate and apart from any contractual obligation. . . . The show cause order is bottomed on the Commission's primary jurisdiction under Section 14(a) of the Act to determine whether the service obligations imposed under Section 7 of the Act by the issuance of outstanding certificates of public convenience and necessity are being violated, and if so, what remedies are appropriate."

25. Turning to the "central issue", that is, the nature and extent of the service authorized by the certificates involved herein, Judge Levy noted that National Exploration and the McCombs Group contended that the service was limited to existing wells and that the McCombs Group contended, further, that it was also limited to the formation into which existing wells had been drilled.[7] He took the position, however, that

> "The 'service' required under the [Natural Gas] Act upon certification is not limited to the service actually being performed by the producer but extends to the service proposed, including the supply of gas dedicated to interstate use, which the producer has undertaken to perform in applying for certification and which the Commission has relied upon in evaluating whether the proposed service and gas supply meet the public convenience and necessity requirements of the Act."

26. Applying this principle, Judge Levy found that Docket Nos. G-2997 and G-2998 "covered the continuing sale to United of gas produced from the dedicated acreage including the Butler B lease." The service which Mrs. Quin agreed to perform was not limited to particular wells or reservoirs, he found, but covered the sale of all gas produced during the term of the 1953 Gas Purchase Contract, as amended, in specified acreage, including the Butler B tract. And that service was continued in the successor certificate issued in Docket No. G-12694.

[7] In their Brief on Exceptions, the McCombs Group and du Pont contend that Judge Levy's fuller statement misstates their position.

27. Judge Levy relied, in this connection, on the statement in Opinion No. 467 (*Cumberland Natural Gas Company, Inc., et al.*, Docket Nos. G-18740 *et al.*), 34 FPC 132, 136 (1965):

> "The principle is well established that dedication of reserves for sale in interstate commerce occurs at least as soon as deliveries commence, and that once such service is begun, the producer cannot terminate the service without Commission approval. *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 387-389 (1959); *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 156 (1960)."

He found that gas deliveries to United from certificated acreage, including gas from wells which had been drilled subsequent to the issuance of the original certificates, continued up to 1966, and that "existing wells were depleted by the end of 1966 and United subsequently withdrew its measuring facilities." Furthermore, he rejected an argument that abandonment should be authorized *nunc pro tunc* on the basis that the Butler B tract is now known not to have been depleted in 1966, and that the deeper reserves thereunder were dedicated to interstate commerce under the original certification.

28. Judge Levy concluded that "the service authorized and the gas supply dedicated by the certificates involved herein include any and all gas produced from the Butler B acreage" and, consequently, the unauthorized intrastate

sale of that gas violates the Natural Gas Act. Additionally, he concluded that however negligent United may have been in asserting its rights, and however innocent the respondents may have been, the respondents should be required to cease and desist from continuing their illegal sales and to file applications under Section 7 for authority to make approved sales. Finally, Judge Levy concluded that the record was inadequate for determining the volumes attributable to the Butler B lease which were diverted, "and for defining the terms and conditions, including price, of past, present, and future sales." Accordingly, he said that all questions relating to appropriate remedies would be reserved for resolution after the respondents file applications for new certificates covering sales from the Butler B tract.

29. Additionally, Judge Levy denied the McCombs Group's motion that he exclude from consideration copies of the applications in Docket Nos. G-2997 and G-2998 which United supplied in the form of appendices to its reply brief after it became apparent that the applications were no longer available in the Commission's files. He noted, in this connection, that the McCombs Group did not challenge the accuracy or authenticity of the copies.

30. Accordingly, Judge Levy ordered the respondents to file, pursuant to Section 154.92(d) of the Commission's Regulations Under the Natural Gas Act, as successors in interest to the dedicated acreage and the service authorized in Docket No. G-12694, and for such other authorization as may be necessary to comply with Section 7 of the Natural Gas Act and the regulations thereunder. He also ordered them to cease and desist their current sales of Butler B gas to the intrastate market.

EXCEPTIONS

31. The McCombs Group, together with du Pont,[8] except to certain statements (I.D., pages 5, 6, 8, 11 and 14) to the effect that Section 7(c) certificates *require* service, pointing out that such certificates merely *authorize* service and that Section 7(b), instead, prohibits the abandonment of service and, conversely, requires its continuance. They assert that "service rendered" is the measure of dedication under Section 7(b), not service *proposed* (I.D., pages 8 and 9), service *authorized* (I.D., page 8) nor service *agreed to be performed* (I.D., page 9)—and they conclude that the issue to be determined is the areal and temporal scope of the "service rendered".

32. Citing a number of cases, they exclude from the measurement of the areal scope of the "service rendered" (1) the contract, since service is not required to commence simply because there is a contract, and service must be continued although there is no contract, or the contract expires; (2) the certificate, since a certificate does not require service, and service must continue although there is no certificate, or the certificate is invalid; and (3) the lease, since leases are not "facilities subject to the jurisdiction of the Commission" within the meaning of Section 7(b). By this process of exclusion they conclude that "actual deliveries" are the proper measure of "service rendered", that the "service rendered" from the Butler B lease was from reservoirs at a depth of approximately 2,900 feet and that, "As the measure of 'service rendered' ceased in 1966, so did the application of Section 7(b)." Citing a number of cases, they assert that the purpose of Section 7(b) is to require the continuance of service once it is rendered and the public relies on it; that such purpose

[8] Louis H. Haring, Jr., adopts the McCombs Group's exceptions "except where inconsistent with the rights of this Respondent." Additionally, he lists eight specific exceptions which are cumulative in substance.

can no longer be served when the known reserves are depleted and the service is in fact discontinued;[9] and that the McCombs Group is rendering a separate and distinct service from 8,000 and 9,000 feet depths which should not be subjected to a "'silent lien'" because the public has not relied on it. Opinion No. 467 cited by Judge Levy is inapplicable, they claim, because the Commission found that the wells in question were not fully depleted, (34 FPC at page 134), and because it was not contended, as is urged here, that the gas purchase contract was void.

33. The McCombs Group, together with du Pont, also except to Judge Levy's reliance upon the 1953 Gas Purchase Contract to determine the scope of the dedication to interstate commerce (I.D., page 9), on the basis that the Commission cannot determine the validity of contracts, and the validity of that contract is in dispute.[10] And noting that Section 306 of the Federal Power Act specifically authorizes *persons* to file complaints with the Commission, they argue that the omission of that word when that provision was reenacted as Section 13 of the Natural Gas Act negates similar authorization, and further, that Section 16 of the Natural Gas Act does not give the Commission independent authority to so provide by regulation.

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[9] In *Harper Oil Company* v. *Federal Power Commission*, 284 F.2d 137 (CA 10, 1960), the court said that ". . . once an independent producer of gas has dedicated his production to interstate commerce and thereby has come under the jurisdiction of the Commission, he remains thereunder *so long as production continues* [Emphasis added]." And in *Hunt* v. *Federal Power Commission*, 306 F.2d 334 (CA 5, 1962), the court said, "Like the ancient covenant running with the land, the duty to continue to deliver and sell flows with the gas from the moment of the first delivery *down to the exhaustion of the reserve*, or until the Commission, on appropriate terms, permits cessation of service under § 7(b), 15 USCA § 717f(b) [Emphasis added]."

[10] In the light of such reliance, they urge that he erred in refusing to permit discovery and to admit evidence relevant to its validity.

34. On evidentiary matters, they assert that Judge Levy erred in refusing to admit evidence on the question of abandonment in the light of his statement that it would not be in the public interest to authorize abandonment (I.D., page 11). They also claim that he erred in admitting into evidence copies of the applications in Docket Nos. G-2997 and G-2998 which were supplied by United after they pointed out in their Initial Brief that those dockets had been destroyed and, consequently, the scope of the service which the Commission had authorized could not be determined. Contrary to Judge Levy's statement (I.D., page 14), they assert that they "most assuredly challenged the accuracy and authenticity of these copies" and that they want an opportunity for confrontation and cross-examination. Finally, they complain that the Initial Decision does not contain a statement of facts officially noticed as required by § 1.30(g) of the Commission's Rules of Practice and Procedure.

35. The McCombs Group, together with du Pont, assert that while the Initial Decision finds that United received gas under the 1953 Gas Purchase Contract, it fails to find that United received gas from the Butler B lease, as distinguished from other leases under that contract. "Indeed," they say, "the record is devoid of any evidence on this issue." Furthermore, they claim, since the applications in Docket Nos. G-2997 and G-2998 are not properly in evidence, and since the copies furnished by United did not include Exhibits C specified therein, there is no support in the record for a finding that Exhibits C were in fact the 1953 Gas Purchase Contract, as amended, and consequently there is no support for a finding that certificates cover the Butler B lease. Finally, they assert, the certificates in Docket Nos. G-2997 and G-2998 covered oil-well gas but not gas-well gas, as discussed in Section IV of their Initial Brief which "is incorporated herein by this reference."[11]

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[11] We decline to consider such incorporated material on the basis of § 1.31(b)(2) of the Commission's Rules of Practice and Proce-

Hence, they claim, United and the staff failed to prove a prima facie case, and the Initial Decision erred in failing to find that United and the staff had the burden of proof.

36. The McCombs Group, together with du Pont, claim that they were denied a fair and impartial hearing because the Commission is "so embroiled in obtaining supplies for the interstate market", particularly in the light of United's supply shortage, both of which permeate the orders and pleadings in this proceeding. "Neither United's supply problems nor the problems with the Commission has in obtaining supplies for the interstate market, have any bearing on whether the McCombs Group's gas is dedicated to interstate commerce."[12] Furthermore, they claim, United has waived its rights under the Natural Gas Act and, as discussed in Section V of their Initial Brief which is "incorporated herein by this reference",[13] is estopped and barred by laches from enforcing them.

37. The McCombs Group, together with du Pont, urge that the Commission does not have authority under the Natural Gas Act to order them to repay to United the volumes which were produced from the Butler B tract. They pointed out, in this connection that the 1953 Gas Purchase Contract provides, "Seller shall have the right to sell, utilize or dispose of any surplus natural gas which Buyer is not purchasing from time to time", and that until June 6, 1973, United had not exercised its possible right under that provision. They urge, in addition, that Haring and each member of the McCombs Group holds a small pro-

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dure which requires that briefs on exceptions be "self contained". The McCombs Group's and du Pont's brief is 31 pages, single spaced, exclusive of appendices, and is therefore longer than the 50-page double spaced briefs which the rule formerly contemplated.

[12] By this statement they appear to concede that dedication, as distinguished from contractual rights, is the central issue.

[13] See footnote 11.

ducer certificate, that § 154.110 of the Commission's Regulations Under the Natural Gas Act specifically provides that §§ 154.92, *et seq.*, shall not apply to small producer sales made under small producer certificates and, consequently, Judge Levy erred in ordering them to file an application for a successor certificate pursuant to § 154.92(d). The Commission cannot issue cease and desist orders, they contend, but must go into a Federal District Court pursuant to Section 22 to stop violations of the Natural Gas Act. Judge Levy should have ordered abandonment *nunc pro tunc*, they claim, since there is evidence that no one was aware of the deeper reserves in 1966; and any order requiring deliveries to United should provide for pregranted abandonment in the event of reversal on appeal.

38. National Exploration asserts that from the language of Mrs. Quin's applications and particularly from the fact that she filed one application for existing service and another for proposed service, and from her disclaimer of Federal Power Commission jurisdiction in the wake of *Phillips*, supra, that the Commission did not certificate all natural gas service from the Butler B lease because it is unreasonable to assume that she intended to certificate more than the existing and proposed natural gas service from existing oil wells which penetrated relatively shallow depths. It asserts, additionally, that that service was abandoned *de facto* in 1966, and that the Commission should authorize its abandonment *nunc pro tunc* since neither United nor its customers relied on it after 1966;

39. Furthermore, according to National Exploration, it was unaware of United's possible interest in the Butler B tract until after it had drilled its two wells; and when it learned of United's claim it entered into an agreement with United not to sell, deliver or use gas attributable to the Butler B lease until it was determined that United had no rights to that gas, or until August 1, 1973. Thus, by contract dated May 14, 1973, National Exploration commenced a 60-day emergency sale to United pursuant to

Order Nos. 418 and 431. On June 5, 1973, it filed an application in Docket No. CI73-857 to obtain a limited term certificate to extend its sale to United for one year. While that application was pending the Commission, on September 14, 1973, issued Order No. 491 authorizing 180-day sales, and National Exploration commenced such a sale to United and withdrew Docket No. CI73-857. By the end of January 1974, National Exploration claims, it had produced 3,042,423 Mcf of natural gas from the Butler B lease and had sold 5,942,548 Mcf [14] to United under their various contracts and the several Commission orders, thereby fulfilling any obligation it may have had. Thus, Judge Levy erred in failing to find that all of its sales of natural gas produced from the Butler B lease were made pursuant to Commission orders,[15] that it was not selling such gas in intrastate commerce [16] and that it was not violating Section 7 of the Natural Gas Act.

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[14] National Exploration uses the figure, 3,530,135 Mcf, in its brief opposing exceptions.

[15] National Exploration states that it sold gas from the McCaskill Field, additionally, to Texas Eastern Transmission Corporation and Transcontinental Gas Pipe Line Corporation pursuant to Order Nos. 418 and 431, and to Valley Gas Transmission Company pursuant to those orders and Order Nos. 491 and 491-B. Those orders provided its only vehicles for selling its gas in interstate commerce and avoiding indefinite dedications which could be terminated only by complying with Section 7(b) of the Natural Gas Act, while Docket No. CP73-4 was pending—so that it could fulfill its *raison d'etre* of selling gas in interstate commerce to its affiliate, Elizabethtown Gas Company (see footnote 3). Its sale to Elizabethtown authorized by Opinion No. 678 commenced January 11, 1974.

[16] National Exploration states that it has a 50% working interest together with Tesoro Petroleum Company (Tesoro) in certain acreage in the McCaskill Field which is not involved herein, that it purchases Tesoro's working interest gas under a long term contract and that it sells about 8,000 Mcf of that gas per day in intrastate commerce to Delhi Gas Pipe Line Corporation. Thus, it contends that it has sold none of the gas which is the subject of United's complaint in intrastate commerce.

40. While United agrees with Judge Levy's decision that it is entitled to "any and all gas produced from the Butler B acreage" (I.D., page 11),[17] it excepts to his failure to require the respondents to commence deliveries to it immediately and to make up past volumes which were delivered to others. United asserts, in this connection, that it would be contrary to the Natural Gas Act to allow National Exploration a credit for the volumes which it sold to United under emergency procedures, particularly since (1) National Exploration did not purport to discharge its possible obligation to United, and (2) National Exploration's rates exceeded those under the 1953 Gas Purchase Contract and the Commission's area rates. United also asserts, in this connection, that it "has no objection to paying any interim rate which the Commission might establish pending completion of the remanded proceedings prescribed by the Presiding Judge", and it suggests (1) the maximum applicable area rate under Opinion No. 595 of 25 cents per Mcf with tax and Btu adjustments, (2) the maximum area rate under Opinion No. 662 of 35 cents per Mcf with certain adjustments, (3) the McCombs Group's rate to du Pont of 35 cents per Mcf with tax and Btu adjustments or (4) National Exploration's rate to Elizabethtown in Opinion No. 678 of 45 cents per Mcf. And repayments should be effected, according to United, by requiring the McCombs Group to allocate all of the gas to United which it produces from McCombs-Butler Gas Unit Nos. 1 and 2—not simply the respective Butler B percentages—until the volumes which were delivered to Lo-Vaca Gathering Company for du Pont are recovered.

41. Similarly, the staff agrees with Judge Levy's decision that United is entitled to all of the gas which is pro-

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[17] Nevertheless, United asserts that Judge Levy's imprecise directive to cease and desist the intrastate sales of gas "produced from the Butler B lease" (I.D., ordering paragraph (2)) should be revised to prohibit intrastate sales of gas " 'produced from or attributable to the Butler B lease'."

duced from the Butler B lease. However, the staff takes the position that the respondents have an obligation to restore to interstate commerce the volumes which were illegally diverted and, consequently, it excepts to Judge Levy's failure to acknowledge and exercise his authority under Section 16 of the Natural Gas Act.[18] to order such restoration. It states, in this connection, that in the absence of evidence of uneconomical production, the rate should not exceed the applicable area rate of 25 cents per Mcf.

42. In opposition, the McCombs Group, together with du Pont, assert (1) that the Commission cannot order reparations from the Butler A volumes in the manner suggested by United since it cannot extend its jurisdiction over "acreage which is admittedly non-jurisdictional" and (2) that it cannot order du Pont to return the gas which it purchased since the gas is beyond the Commission's reach in the hands of a non-jurisdictional entity, namely, Lo-Vaca Gathering Company. In any event, they assert, the Commission does not have authority to enter a reparation order,[19] and the 1953 Gas Purchase Contract specifically provides that "Seller shall have the right to sell, utilize or dispose of any surplus natural gas which Buyer is not purchasing from time to time . . ." They point out that the Initial Decision, in effect, requires a temporary discontinuance of production from the Butler B lease to their detriment as well as to the detriment of United in view of the probable drainage from nearby wells—and they urge that such a decision exceeds the Commission's authority

[18] "The Commission shall have power to . . . issue . . . such orders . . . as it may find necessary or appropriate to carry out the provisions of this act."

[19] They cite *Federal Power Commission* v. *Hope Natural Co.*, 320 U.S. 591, 595, 618 (1944); ***Willmut Gas & Oil Co.* v. *United Gas Pipe Line Co.***, 12 FPC 132, 146, 399, 401-402 (1953), arguing that Section 16 of the Natural Gas Act merely augments existing authority and does not confer independent authority.

since the correlative rights of the owners of the gas in place would thereby be disturbed. However, they agree with Judge Levy that the record is inadequate for determining the terms and conditions, including price, of past, present and future sales and, consequently, they suggest that the *status quo* should be maintained while such a record is developed.

43. In opposition, National Exploration reasserts its positions that it has sold no Butler B volumes in intrastate commerce and that it would be unreasonable to order it to make further deliveries to United since it sold United more gas than it produced from its portion of the Butler B lease through January 31, 1974. If it has to sell any gas to United, National Exploration asserts, "the reasonable basis for price is the price voluntarily negotiated by United" with National Exploration in 1973.

44. In opposition, and citing *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 149 (1960), United argues that an applicant for a certificate of public convenience and necessity who accepts that certificate "voluntarily assumes an obligation to comply with such terms and conditions as the Commission may attach to the certificate, such as performance of the service covered by the application." The producer-applicant's service obligation, United continues, is "defined by the producer's undertaking in support of its application" which, in this case, is embodied in the 1953 Gas Purchase Contract and which, in turn, dedicated to United all merchantable natural gas underlying or attributable to the respective leases, including the Butler B lease. Dedication is not restricted to the reservoir from which natural gas is being drawn at the time of dedication, United urges, but covers all of the acreage described in the contract, "both proven and unproven".

Pioneer Gathering System, Inc., et al., Docket Nos. G-11548 *et al.*, 23 FPC 260, 263 (1960).[20]

45. United urges that the service which Mrs. Quin offered for certification in Docket No. G-2998 was the sale of gas "pursuant to" the 1953 Gas Purchase Contract and, therefore, included all gas deliverable to United under that contract. And the sources of the gas which she offered therein were the "acreage owned and controlled by applicant", including the Butler B lease. When those sources were dedicated to interstate commerce by the issuance of a certificate and the commencement of deliveries, United continues, " 'there can be no withdrawal of that supply from continued interstate movement without Commission approval.' " *Atlantic Refining Co., et al.* v. *Public Service Commission of the State of New York, et al.*, 360 U.S. 378, 389 (1959). United asserts, in this connection, that the testimony of its Mr. Aubin (Tr. 79) and Mr. Haring (Tr. 206) established that United received gas from the Butler B lease pursuant to the 1953 Gas Purchase Contract. And while their testimony to that effect may be challenged in the light of their other testimony, there is no challenge to Mr. Aubin's further testimony (Tr. 46-47, 79-80, 125-126 and Exhibit 29) that United received gas from acreage (not necessarily the Butler B lease) dedicated under the 1953 Gas Purchase Contract—and *Pioneer* and *Cumberland*, supra, hold that when deliveries are commenced from part of the acreage which is embraced by a certificate, dedication to interstate commerce is completed as to all of the acreage which is so embraced.

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[20] United points out, in this connection, that in *Standard Oil Company of Texas* v. *Lopeno Gas Company*, 240 F.2d (1957), the court held that a 1935 sale of "all merchantable gas which may be produced from all gas wells now drilled or which may hereafter be drilled on the described premises" covered gas which was found at a depth of 9,100 feet in 1953, even though the only known gas in 1935 was produced from depths of 2,200 to 3,000 feet.

46. United urges that the Commission should not authorize abandonment *nunc pro tunc*, among other reasons, because the fact that the Butler No. 7 Gas Well stopped producing in 1966 does not establish that "the available supply of natural gas" throughout the Butler B lease "is depleted to the extent that the continuance of service is unwarranted" within the meaning of Section 7 (b). Furthermore, United argues, the Commission's action in ordering repayments will be in support of its jurisdiction under Section 7(c) of the Natural Gas Act and will not, therefore, be based on Section 16 alone. And while the Commission has no authority to determine the validity of the 1953 Gas Purchase Contract, United concedes, nonetheless, it may consider that contract in determining the scope of Mrs. Quin's certificates—even in the face of the McComb Group's claims of invalidity. Finally, on evidentiary matters, United asserts that Judge Levy (1) properly rejected efforts to introduce evidence on antitrust matters since the activities in question terminated in 1965; (2) properly rejected end-use evidence since it would be pertinent only to a current abandonment and (3) properly received into evidence copies of signed and notarized duplicate original applications in Docket Nos. G-2997 and G-2998, among other reasons, because of their obvious authenticity and because of the numerous opportunities which the respondents have had to comment on them.

47. In opposition, the staff takes largely the same positions as United and, consequently, its arguments will not be repeated. Additionally, the staff suggests that § 154.110 of the Commission's Regulation Under the National Gas Act, which provides an exemption from the filing requirements of § 154.92(d) in the case of small producers, should not be applicable in a case such as this where the small producers are violating Section 7 of the Natural Gas Act.

Du Pont's Motion to Dismiss

48. By motion [21] on May 6, 1974, du Pont asks us to dismiss this proceeding or, in the alternative, to reconsider our show cause order, insofar as du Pont is concerned. Du Pont asserts that it is not a "natural-gas company" within the meaning of Section 2(6) of the Natural Gas Act and is not, therefore, subject to the Commission's jurisdiction, and that the Initial Decision does not order it to do anything. In an answer filed May 20, 1974, United claims that du Pont is a "natural-gas company" because it is purchasing gas which is dedicated to interstate commerce, permitting Lo-Vaca Gathering Company to use those volumes until du Pont requests delivery of comparable volumes, and must redeliver such comparable volumes to United's interstate system—"such activity places du Pont in the middle of the stream of interstate commerce". In any event, United asserts, the Commission has authority under Section 14 of the Natural Gas Act to investigate the activities of *any person* which it believes has violated or is about to violate that Act or any rule, regulation or order issued thereunder.

Discussion

49. We reject the common contention of the McCombs Group, du Pont and Haring that Section 13 of the Natural Gas Act [22] does not authorize the filing of complaints by *persons,* such as United, as does Section 306 of the Federal Power Act.[23] This proceeding was expressly commenced

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[21] Renewal of Motion to Dismiss and Motion to Reconsider Show Cause Order as to E. I. du Pont de Nemours & Company.

[22] "Sec. 13. Any State, municipality, or State commission complaining of anything done or omitted to be done . . . may apply to the Commission by petition. . . ."

[23] "Sec. 306. Any *person,* State, municipality, or State commission complaining of anything done or omitted to be done . . . may apply to the Commission by petition . . . [Emphasis added]."

under § 1.6 of the Commission's Rules of Practice and Procedure, 18 CFR § 1.6, and those rules were lawfully adopted under Sections 16 of the Natural Gas Act and 309 of the Federal Power Act, among other statutory provisions. Accordingly, this complaint proceeding was lawfully commenced under that regulatory provision which provides in pertinent part,

> "Any person, including any State or local commission, complaining of anything done or omitted to be done by any licensee, public utility or natural-gas company in contravention of an act, rule, regulation, or order administered or issued by this Commission, may file a complaint with the Commission."

50. The McCombs Group and the others are undoubtedly correct in their contention that natural gas service from the Butler B tract could not have been terminated lawfully without the Commission's having granted abandonment authorization under Section 7(b) of the Natural Gas Act. And they are undoubtedly correct in their assertion that the purpose of Section 7(b) is to require the continuance of service once it has been commenced and the public has relied on it, and further, that Section 7(b) could not as a practicable matter have served that purpose when natural gas service from the Butler B tract was discontinued in 1966 in the belief that the reserves had been depleted. But the obligation to continue natural gas service does not arise from Section 7(b) alone. It comes into existence through the acceptance of a certificate under Section 7(c) of the Natural Gas Act, the commencement of service thereunder and, finally, the prohibition of Section 7(b).

51. In determining the scope of a certificate we must look to the application including any amendments to the application which may have been filed, together with the exhibits which are part of the application and the order granting the application and issuing the certificate. We do not

reject out-of-hand the contention of the McCombs Group and the others that "service rendered" as measured by "actual deliveries" is critical, for the manner in which parties operate under a certificate could be helpful in determining its scope in appropriate cases. In this case, however, that measure appears to be of little or no help since the delivery of natural gas from a depth of approximately 2,900 feet in the Butler B tract is consistent with the positions of both the complainant and the respondents. While it is consistent with the proposition that only reservoirs to that depth were dedicated to United in interstate commerce, it is equally consistent with the proposition that reservoirs to any depth were so dedicated.

52. United claims the natural gas in question under the successor-in-interest producer certificate issued in Docket No. G-12694 on June 19, 1963,[24] at which time the Commission said,

> "A certificate will be issued in Docket No. G-12694 to H.A. Pagenkopf, Trustee (Operator), *et al.*, to continue the service initiated by Bee Quin authorized in Docket Nos. G-2997 and G-2998, and the latter certificates will be terminated."

An examination of Docket No. G-12694 indicates that the scope of the certificate issued therein must be determined from the predecessor certificates in Docket Nos. G-2997 and G-2998. As noted, those dockets apparently have been destroyed, and the purported copies of the applications contained in those dockets which were furnished by United have not been subjected to cross-examination.

53. We will avoid the foregoing infirmity of the applications for certificates in Docket Nos. G-2997 and G-2998 by determining the scope of the certificates issued therein

[24] We take official notice of Docket No. G-12694, including our order of June 19, 1963, since such documents are not part of the record.

on the basis of the best other record evidence available, principally, the Butler B lease and the 1953 Gas Purchase Contract [25] (as amended to the time the applications were filed), together with the Commission's orders issuing the certificates.[26]

54. As noted, Order No. 174-A issued August 6, 1954, spoke of two different filing dates depending upon whether the applicant-producer engaged in the particular jurisdictional activities on the date of the *Phillips* decision, *supra*, June 7, 1954. As noted, the 1953 Gas Purchase Contract was amended on September 7, 1954, sixteen days before Docket No. G-2997 was filed, to embrace additional leaseholds and to provide for the sale of oil-well gas (as distinguished from gas-well gas), and the Commission's order issuing the certificate in that Docket on December 8, 1954,

[25] Judge Levy properly refused to permit discovery and to admit evidence relevant to the validity of the 1953 Gas Purchase Contract. The certificates in Docket Nos. G-2997 and G-2998 authorized the proposed sale and continued sale, respectively, of natural gas under the 1953 Gas Purchase Contract and, consequently, the terms of that agreement are relevant to questions pertaining to the scopes of those certificates whether or not that agreement was and is valid. Furthermore, the Commission may interpret its certificates covering sales under the 1953 Gas Purchase Contract and thereby determine the rights of the parties under its certificates even though it may not directly interpret the 1953 Gas Purchase Contract to determine the rights of the parties under that agreement.

Similarly, Judge Levy properly refused to admit evidence relevant to possible abandonment because the record shows overwhelmingly that the available supply of natural gas is not depleted within the meaning of Section 7(b) of the Natural Gas Act. Whatever action the Commission may have taken under that provision from the time production ceased in 1966 until it was resumed in 1971, it cannot consider abandonment or abandonment *nunc pro tunc* where the supply of natural gas is not depleted.

[26] While copies of these orders were distributed by staff counsel, they were not made part of the record and, consequently, we take official notice of them.

spoke of a "proposed" sale. As a result, it is reasonable to conclude that the certificate in Docket No. G-2997 embraced the proposed sale of oil-well gas from the leaseholds which were subject to the 1953 Gas Purchase Contract through its amendment on September 7, 1954. No further refinement will be attempted since oil-well gas is not in issue in this proceeding.

55. It is also reasonable to conclude that the certificate in Docket No. G-2998 embraced the ongoing sale of gas-well gas [27] from the leaseholds which were subject to the 1953 Gas Purchase Contract through its amendment on September 7, 1954. As noted, Bee Quin agreed therein to sell and deliver to United, and the latter agreed to purchase and receive "merchantable natural gas . . . produced from all wells now or hereafter drilled during the [10 year] term of this contract" on the specified leaseholds, including the Butler B tract, "and Seller's proportionate part of all merchantable natural gas produced from any well or wells located on any unit or units which include any part of said lands and leaseholds . . ." In the absence of any mention of particular depths, we read that language to include gas produced from any depth and, further, gas produced beyond the term of the contract from wells which were drilled during the term of the contract. In other words, Bee Quin dedicated at least that much to United in interstate commerce.

56. As noted, the 1953 Gas Purchase Contract was amended by H. A. Pagenkopf, *et al.*, on February 7, 1961, to fix certain prices and extend its term to February 7, 1981. The Commission by order issued June 19, 1963, issued a certificate in Docket No. G-12694 authorizing H. A. Pagenkopf, Trustee, to continue the service which had been initiated by Bee Quin pursuant to authorization in Docket Nos. G-

[27] The term "natural gas" is defined in the 1953 Gas Purchase Contract, prior to amendment, to exclude oil-well gas.

2997 and G-2998, as more fully described in the application. That application was amended by H. A. Pagenkopf, Trustee, on February 14, 1961, to substitute himself as operator, and it mentions the amendment to the 1953 Gas Purchase Contract dated a week earlier, February 7, 1961. We are therefore justified in concluding that whatever limitations may have been inherent in the Bee Quin dedications, H. A. Pagenkopf, Trustee, extended the certificated Bee Quin dedications to embrace gas produced beyond the extended term from wells which are drilled during that extended term.

57. When the Bee Quin and H. A. Pagenkopf dedications are considered together, we are justified in concluding (without considering the purported applications in Docket Nos. G-2997 and G-2998) that the certificate in Docket No. G-12694 nominally [28] covers the merchantable natural gas produced from any depth and from all wells drilled through February 7, 1981, on the leaseholds subject to the 1953 Gas Purchase Contract through its amendment on February 7, 1961. And we are justified in concluding additionally, that it covers all gas produced from those wells to the extent that those leaseholds are not unitized—and to the extent that they are unitized, it covers an allocable portion of the gas produced from those wells together with the allocable portions of the gas produced from wells on the leaseholds which are unitized with them. Of critical importance to this proceeding, it covers all of the gas which has been produced from or attributable to the Butler B lease since gas was rediscovered at deeper depths late in 1971.

58. Having thus determined the scope of the certificate in Docket No. G-12694, it would not be inappropriate to

[28] The scope of the certificate is said to be "nominal" because, for practicable purposes, service thereunder cannot lawfully be discontinued under Section 7(b) until "the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or . . . the present or future public convenience or necessity permit such abandonment."

turn to the purported applications in Docket Nos. G-2997 and G-2998 to confirm or reject our findings. Since United is a party to the 1953 Gas Purchase Contract and its amendments it is reasonable that United would have copies of the applications in those dockets among its business records. Furthermore, the copies furnished by United purport on their faces to bear the notarized signatures of Bee Quin, and we note from Exhibit 23 that "Mrs. S. J. Granberry (formerly Bee Quin)" was a partial owner of McCombs-Butler Gas Unit Nos. 1 and 2 as of May 18, 1972. While the McCombs Group and the others assert, as noted, that they "most assuredly challenge the accuracy and authenticity" of the copies furnished by United, they do not claim that they are not true copies of the applications which were filed in Docket Nos. G-2997 and G-2998, at least in material respects. If the McCombs Group and the others had anything to offer, in this regard, there is little doubt that they would have brought it forward by this time.

59. The description of the "Service To Be Certificated" in the purported application in Docket No. G-2997 states in pertinent part:

> "Applicant was not selling gas from the leases covered by this application on June 7, 1954; but to comply with the regulation of the Railroad Commission of the State of Texas for the purpose of preventing waste of natural gas, applicant proposes to to [sic.] sell natural gas to United Gas Pipe Line Company commencing on October 25, 1954, pursuant to a contract amendment dated September 7, 1954. . . ."

and the similar description in the purported application in Docket No. G-2998 states:

> "On and since June 7, 1954, applicant has sold and delivered natural gas to United Gas Pipe Line Company, a corporation, at the well site of each of applicant's wells in the South Porter Gas Field, Karnes

> County, Texas, pursuant to a contract which is attached hereto as Exhibit 'C' ".

We conclude that there is nothing in the purported applications that causes us to change our findings as to the scope of the certificate in Docket No. G-12694.[29]

60. Having determined the scope of its certificate in Docket No. G-12694, it is appropriate to turn to the question of whether service commenced thereunder or under its predecessor certificates. While there is some record evidence, in this connection, that United received gas from the Butler B lease,[30] there is substantial unchallenged record evidence that United received gas from acreage (not necessarily the Butler B lease) which is dedicated to it under the 1953 Gas Purchase Contract.[31] And *Pioneer* and *Cumberland,* supra, as well as the recent decision in *Mitchell Energy Corporation,* Docket No. CI75-296 (Opinion No. 733 issued June 11, 1975), hold that when deliveries are commenced from part of the acreage which is embraced by a certificate, dedication to interstate commerce is completed as to all of the acreage which is so embraced.

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[29] While there is a challenge as to whether a copy of the 1953 Gas Purchase Contract was in fact the attachment designated as Exhibit "C", it is established that the copy of the 1953 Gas Purchase Contract in evidence is a true copy of the agreement under which United purchased natural gas from Bee Quin and her successors in interest.

[30] T. L. Aubin, Jr., General Manager of United's Gas Acquisition Department, testified (Tr. 80) that United stopped receiving deliveries from the Butler B lease in September 1966, and Respondent Haring testified (Tr. 206) that there were some deliveries of natural gas to United from the Butler No. 7 well on the Butler B tract in 1966.

[31] For example, Mr. Aubin testified (Tr. 46-7) that United received natural gas for its interstate pipeline system pursuant to the certificates in Docket Nos. G-2997, G-2998 and G-12694.

61. Furthermore, there is no challenge to the Commission's finding in its order of June 19, 1963, that Bee Quin had initiated the service authorized in Docket Nos. G-2997 and G-2998. The commencement of service completed the dedications to United in interstate commerce and thereby invoked the protection of Section 7(b).

62. As is implicit in the foregoing conclusion that United was and continues to be entitled to gas *attributable* to the Butler B lease, we are giving effect to the principles of unitization embodied in the Butler B lease and appearing in the 1953 Gas Purchase Contract which, in effect, authorize the transformation of the independent Butler B leasehold into an undivided part of a larger leasehold. As noted, the Butler B lease authorizes the unitization of that leasehold or any portion of it and provides that the production of gas from "any portion of any such unitized area in which all or any part of the land described herein is embraced, shall have the same effect as though a well had been commenced or completed on the land herein described or production obtained under the terms hereof." And, as noted, the 1953 Gas Purchase Contract specifically embraces the "proportionate part of all merchantable natural gas produced from any well or wells located on any unit or units which included any part" of the leaseholds embraced thereby.

63. While it may be argued that acceptance of the principles of unitization as part of the terms and conditions of a producer certificate would permit the operator of a leasehold which is dedicated to interstate commerce to deliver part of the gas underlying that leasehold in intrastate commerce if he should unitize that leasehold with an adjoining one which is not so dedicated, acceptance of those principles would also bring into interstate commerce a proportionate part of the gas underlying the adjoining leasehold which is not so dedicated. In any event, in the context of unitization there is nothing sacrosanct about the physical location of natural gas at any point in time. Since unitization is authorized only with respect to leaseholds in the same general area, and since there is no relationship between the surface boundaries of leaseholds and the subsurface limits of natural gas reservoirs, and since natural gas flows under fluidic principles, natural gas wells on adjoining leaseholds frequently tap the same reservoirs and, as a result, a well on a leasehold which is not dedicated to interstate commerce is as likely to produce any given molecule of gas as one on a dedicated leasehold, regardless of the physical location of that molecule as underlying one or the other of the leaseholds at some other point in time. On balance, therefore, our acceptance of the principles of unitization as part of the terms and conditions of the certificates in Docket Nos. G-2997 and G-2998, initially, and in Docket No. G-12694, currently, appears to offer a practicable solution for resolving controversies arising from the interacting complexities of natural gas formations and modern business relationships.

64. While the record is incomplete for the purpose of determining the precise quantities of natural gas to which United is entitled, the principles of unitization suggest the following results:

A. United was not entitled to any of the gas from the McCombs Group's Butler No. 1 Well in the Butler A tract from the time of its completion in September 1971 until McCombs-Butler Gas Unit No. 1 embracing the production depths of that well was designated effective November 1, 1971. Thereafter, United was entitled to 42.9658% of the gas produced from that well until it was shut in.

B. United was and continues to be entitled to 42.9658% of the gas produced from the McCombs Group's Butler No. 2 Well in the Butler A tract within the depths embraced by McCombs-Butler Gas Unit No. 1 from the time of its completion in February 1972. United was not entitled to any gas from other depths of that well from the time of its completion until McCombs-Butler Gas Unit No. 2 embrac-

ing those other production depths was designated on April 3, 1972. Thereafter, United was and continues to be entitled to 52.0767% of the gas produced from that well within the depths embraced by McCombs-Butler Gas Unit No. 2.

C. United was and continues to be entitled to 42.9658% of the gas produced from the McCombs Group's Butler No. 3 Well in the Butler B tract from the time of its completion in September 1972. While that well produces from three depths, according to the record, all are embraced by McCombs-Butler Gas Unit No. 1.

D. United was and continues to be entitled to 42.9658% of the gas produced from the McCombs Group's Butler No. 4 Well in the Butler A tract within the depths embraced by McCombs-Butler Gas Unit No. 1 from the time of its completion in October 1972 and 52.0767% of the gas produced from the well within the depths embraced by McCombs-Butler Gas Unit No. 2, also from the time of its completion.

E. Similarly, United was and continues to be entitled to 14.2045% of the gas produced from the unnamed unit designated by National Exploration on or about November 1, 1971. On the other hand, National Exploration should be entitled to a credit for the volumes of gas which it sold to United notwithstanding that it did not purport to do so pursuant to the certificate in Docket No. G-12694.[32] Any

[32] National Exploration asserts that it was not selling natural gas in intrastate commerce and in violation of Section 7 of the Natural Gas Act because it fulfilled its obligation by selling more gas to United than it produced from the Butler B lease. Under the principles of unitization, however, National Exploration could fulfill its obligation, volumetrically speaking, only by selling United at least 14.2045% of the gas produced from the unit designated by it regardless of the source of that gas as being produced from the Butler B lease or from some other leasehold within the unit. The record does not show how much gas was produced from National Exploration's unit.

excess of the purchase price over the price ultimately fixed on remand should be refunded to United with interest.

65. From the foregoing, United appears to be entitled to 42.9658% of the gas produced from the Butler Nos. 2 and 4 Wells within the depths embraced by McCombs-Butler Gas Unit No. 1 and 52.0767% of the gas produced from those wells within the depths embraced by McCombs-Butler Gas Unit No. 2. Since this proceeding must be remanded to determine the amounts of United's volumetric entitlements within the framework hereof, the parties are directed to provide and file the best evidence available to determine the volumes produced from the depths embraced by each of those units or, if that is not practicable, to offer and support alternative ways to allocate the gas from the Butler Nos. 2 and 4 Wells in the light of United's entitlement to different percentages of the commingled production of those wells.

66. The principles of unitization would also suggest that United is entitled to receive more than its proportionate share of the production until such time as United is made whole for any portion of its share which it did not receive in the past. The plan suggested by United to divert to it all of the production of the respective units until lost volumes are recovered appears to be feasible and to avoid the pitfalls raised by the McCombs Group and the others. However, since remand is necessary, the operators of the respective units will be required to file plans for making United whole for the volumes which were delivered to others and such plans will be considered on remand. See Opinion Nos. 724 and 724-A (*Blair-Vreeland,* Docket No. CI74-331), issued March 18, and May 14, 1975, respectively.

67. The McCombs Group and the others correctly point out that § 154.110 of the Commission's Regulations under the Natural Gas Act specifically provides that § 154.92, *et seq.*, shall not apply to small producer sales made under small producer certificates. While Judge Levy therefore

erred in ordering the members of the McCombs Group and the others to file an application for a successor certificate pursuant to § 154.92(d), such a course appears to be a practicable one and there is nothing to prevent the respondents from following it if they so choose.

68. As small producers, the members of the McCombs Group and the others may sell the natural gas in question to United under their small producer certificates without any direct constraints as to price. It seems unlikely, however, that the parties will be able to negotiate an arms-length price under circumstances where some of them are required to deliver the gas to one of them. As a result, it is appropriate to establish certain parameters for negotiating a rate or rates notwithstanding the respondent-sellers' common status as small producers.

69. No rate justification will be required on remand if the parties agree upon rates which large producers could have charged without special justification. In other words, no justification will be required if they agree upon rates which do not exceed the maximum applicable area rate under Opinion No. 595 and the maximum national rate under Opinion No. 699 on the assumption that separate sales were made immediately upon the completion of each well. On the other hand, the respondent-sellers will be required to justify their proposed rates if the parties do not reach agreement within those parameters. And an appropriate vehicle for seeking justification would be an application pursuant to § 154.92(d) of the Commission's Regulations under the Natural Gas Act for a successor certificate which would effect a termination of the certificate in Docket No. G-12694 and establish a new rate or rates for the respondent-sellers' sales to United.

70. We will defer ruling upon du Pont's motion to dismiss this proceeding as to it until United is made whole for its entitlements which were delivered to others. Du Pont was named as a respondent because it is purchasing natural

gas from the McCombs Group in a transaction which is intrastate and does not, therefore, come within the Natural Gas Act so long as the McCombs Group delivers to Lo-Vaca Gathering Company on behalf of du Pont natural gas which is produced by the McCombs-Butler Gas Unit Nos. 1 and 2 and is not attributable to the Butler B lease. Although it is argued that du Pont is a "natural-gas company" because it is purchasing gas which is produced by those units and is partly attributable to the Butler B lease which has been dedicated to United in interstate commerce, du Pont is not the operator of those units and need not be subjected to any Commission directive unless and until the McCombs Group refuses or fails to comply with our order to make United whole for its Butler B entitlements. When that becomes an accomplished fact we can grant du Pont's motion without deciding whether it has become a "natural-gas company".

71. As the record has developed, we are satisfied that the violations of Section 7 which we find herein commenced in such a manner and continued under such circumstances that we should not, in the exercise of our discretion at this time, transmit evidence concerning them to the Attorney General pursuant to Section 20(a) of the Natural Gas Act for possible criminal proceedings. As noted in paragraph 16, the McCombs Group did not learn of United's interest in the Butler B lease until December 1971, a month after McCombs-Butler Gas Unit No. 1 was designated. And as indicated in paragraph 17, there was some belief even then that United had released the 1953 Gas Purchase Contract. Furthermore, it appears from paragraph 20 that National Exploration did not learn of United's interest until late 1972 or early 1973, some months after it drilled two gas wells in the Butler B tract. Even United negotiated to purchase Butler B gas from the McCombs Group in late 1971 and early 1972 but did not firmly recognize its interest in that gas until it was notified by National Exploration in January 1973 and received the results of a title search

several months later. And although Judge Levy ordered the respondents to "cease and desist the sales currently being made to the intrastate market of gas produced from the Butler B lease", he did not set a date for doing so and order them to comply forthwith with the certificate in Docket No. G-12694. As a result, we cannot say that any respondent has willfully and intentionally violated Section 7 of the Natural Gas Act. We believe that our actions herein, particularly those set out in Ordering Paragraphs (A) and (B), will best serve the public interest under the circumstances which are before us.

The Commission orders:

(A) Billy J. McCombs, R. James Stillings, d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corporation, Louis H. Haring, Jr., National Exploration Company and Bill Forney, all of whom are respondents herein and holders of small producer certificates of public convenience and necessity, shall sell and deliver to United Gas Pipe Line Company in interstate commerce in compliance with the Commission's certificate in Docket No. G-12694, and from the production from their respective gas units embracing portions of the Butler B lease, not less than all of the natural gas which is attributable to their respective interests in the Butler B lease, said sale and deliveries to commence 45 days after the date of this opinion and order, or as soon thereafter as United Gas Pipe Line Company physically connects gathering facilities to receive the gas, at interim rates subject to refund which are equal to the maximum rates applicable to holders of large producer certificates of public convenience and necessity in their situation, i.e., the maximum area rate under Opinion No. 595 and the maximum national rate under Opinion No. 699, on the assumption that separate sales of natural gas were made to United Gas Pipe Line Company immediately upon the completion of each well from which the production is derived.

(B) Within a reasonable period of time to be determined by an administrative law judge, the said respondents shall sell and deliver to United Gas Pipe Line Company in interstate commerce for civil violation of the Commission's certificate in Docket No. G-12694, such volumes of natural gas which are equal to (1) the volumes of natural gas which were produced from their respective interests in the Butler B lease to the extent that such lease was not unitized with other leaseholds and to the extent that said volumes were delivered to others, plus (2) the volumes of natural gas which were attributable to their respective interests in the Butler B lease to the extent that such lease was unitized with other leaseholds and to the extent that said volumes were delivered to others, in both cases the production commencing in 1971 and ending on the date specified in Ordering Paragraph (A). Pending compliance or non-compliance with this Ordering Paragraph (B), decision upon the Renewal of Motion to Dismiss and Motion to Reconsider Show Cause Order as to E. I. du Pont de Nemours & Company, is deferred.

(C) The record of this proceeding is reopened and the said respondents shall file within 45 days after the date of this opinion and order (1) data commencing in 1971 showing the volumes of natural gas which were produced from and/or were attributable to their respective interests in the Butler B lease (including the evidence specified in paragraph 65), and also showing the amounts delivered to United Gas Pipe Line Company and the amounts delivered to others, (2) a plan or plans to carry out Ordering Paragraph (B), (3) their evidence to support such plan or plans and (4) copies of contracts establishing a rate or rates for the sales specified in Ordering Paragraphs (A) and (B) within the parameters of paragraph 69 or, if agreement within those parameters is not reached, such other filings selected by them to establish a rate or rates for the said sales, including possibly an application or applications under Section 154.92(d) of the Commission's Regulations under the

Natural Gas Act for a successor certificate or certificates which would effect a termination of the certificate in Docket No. G-12694 and establish a rate or rates for the said sales, in any case, together with their evidence to support the said rate or rates.

(D) The parties shall file within 60 days after the date of this opinion and order any opposing data, plans, evidence or other matters which they may proffer.

(E) This proceeding is remanded to an administrative law judge (1) to determine the respective volumes of natural gas which the parties are required to sell and deliver to United Gas Pipe Line Company in compliance with Ordering Paragraph (B), (2) to consider and adopt a plan or plans to carry out Ordering Paragraph (B) and (3) to consider and adopt a rate or rates for the sales specified in Ordering Paragraphs (A) and (B) and for the volumes sold and delivered by National Exploration Company to United Gas Pipe Line Company.

(F) The Secretary is authorized to consolidate with this proceeding on remand any applications which may be filed pursuant to Ordering Paragraph (C) to establish a rate or rates for the sales specified in Ordering Paragraphs (A) and (B) and for the volumes sold and delivered by National Exploration Company to United Gas Pipe Line Company.

(G) The hearing herein shall be commenced within 75 days after the date hereof or within 15 days after the date on which responses shall be due on the last application which may be filed pursuant to Ordering Paragraph C, whichever date is later.

(H) By order issued June 17, 1975, the record was reopened and this proceeding was remanded to an administrative law judge for the limited purpose of admitting, supporting and considering a proposed settlement. Whether

or not that settlement is in the public interest shall be determined in the light of this opinion and order.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

(Caption Omitted in Printing)

OPINION NO. 740-A

Opinion and Order Denying Rehearing, Modifying Ordering Provisions, Dissolving Stay, Noticing Phasing of Proceeding, Acting on Emergency Relief, Denying Appeal, Denying Without Prejudice Compliance Order and Denying Reconsideration

(Issued November 7, 1975)

1. In Ordering Paragraph (A) of Opinion No. 740 issued August 20, 1975, we ordered respondents Billy J. McCombs, R. James Stillings, d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corporation and Bill Forney (collectively, the McCombs Group), together with respondents Louis H. Haring, Jr. and National Exploration Company, to sell and deliver to United Gas Pipe Line Company (United) "from the production from their respective gas units embracing portions of the Butler B lease, not less than all of the natural gas which is attributable to their respective interests in the Butler B lease, said sale and deliveries to commence 45 days after the date of this opinion and order. . . ." On September 11, 1975, the members of the McCombs Group together with respondent E. I. du Pont de Nemours & Company (du Pont) filed an application for rehearing and motion for stay pursuant to Section 19(a) of the Natural Gas Act and §§ 1.34 and 1.12 of our Rules of Practice and Procedure asking us to grant rehearing of Opinion No. 740 and stay its ordering provisions.

2. The McCombs Group and du Pont asserted, among other matters, that McCombs-Butler Gas Unit Nos. 1 and 2 were dissolved by instrument entitled "Dissolution of Units" dated May 29, 1974, and recorded October 21, 1974, and further, that the instrument provides that the said

units are cancelled, rescinded and dissolved "effective the date that each of the Unit Declarations was filed of record in Karnes County, Texas." According to the McCombs Group and du Pont, "the effect of this document is to restore the Butler A and B Leases to their separate status, *ab initio*."

3. The McCombs Group and du Pont specified twenty-six errors designated A through Z, respectively, most of which were repetitive of their earlier positions to Administrative Law Judge William C. Levy and, later, to us. Two of the alleged errors related to matters which occurred after the date of Judge Levy's Initial Decision and, therefore, were being raised for the first time. In the one they asserted in greater detail that we failed to consider the pending settlement proposal, and in the other they claimed, also in greater detail, that we erred in not considering the dissolution of McCombs-Butler Gas Unit Nos. 1 and 2. We granted rehearing and a limited stay on September 18, 1975, to afford an opportunity to respond to those newly raised issues and to allow time for their consideration together with the issues raised in their motion for a stay.

The Settlement Proposal Issue

4. The McCombs Group and du Pont assert that the only reference in Opinion No. 740 to the settlement which is pending before Administrative Law Judge Thomas L. Howe[1] is contained in Ordering Paragraph (H) which states,

> "By order issued June 17, 1975, the record was reopened and this proceeding was remanded to an administrative law judge for the limited purpose of admitting, supporting and considering a proposed settlement. Whether or not that settlement is in the public

[1] Designated in this proceeding to replace Judge Levy who has retired.

interest shall be determined in the light of this opinion and order."

And they claim that the foregoing provision precludes a full and meaningful consideration of the settlement proposal on its merits as is required by *Michigan Consolidated Gas Company* v. *Federal Power Commission*, 283 F.2d 204 (CADC, 1960), *cert. denied* 364 U.S. 913 (1960), wherein the court said,

> "Even assuming that under the Commission's rules Panhandle's rejection of the settlement rendered the proposal ineffective *as a settlement*, it could not, and we believe should not, have precluded the Commission from considering the proposal *on its merits*."

5. United, in an answer filed October 3, 1975, asserts that it terminated the settlement proposal as between it and the McCombs Group by letter dated September 17, 1975, and, as a result, that proposal is a "newly-proposed unilateral offer of settlement which United does not support." In addition, United asks for clarification of the phrase in Ordering Paragraph (H), "in the light of this opinion and order", suggesting that it might be construed to refer to benefits which are at least equal to those that would have been received under Opinion No. 740, or that it might be construed to refer to benefits which approach but do not equal those under Opinion No. 740.

6. The Commission staff, in an answer also filed October 3, 1975, points out that Opinion No. 740, among other matters, requires the production of certain data which are essential to an evaluation of the adequacy of the settlement and, consequently, to consideration of the proposal on its merits. In addition, the staff asserts that the settlement cannot yet be reviewed on its merits because the McCombs Group has not fulfilled the staff's outstanding data request.

7. While the McCombs Group and du Pont argue that the settlement proposal is in the public interest in the light of data in the record, we find that their claimed record data consist principally of prepared testimony which was filed on July 16, 1975, but which had not, as of August 20, 1975, the date of issuance of Opinion No. 740, been verified on the record by the witness who, in turn, had not been cross-examined. United, on the other hand, argues that while there is record evidence (Tr. 240) that the McCombs Group sold 10.5 to 11 Bcf of natural gas to du Pont through December 1973, the settlement offer would make a maximum of only 8.5 Bcf available to it and, consequently, that offer is not in the public interest.

8. The portion of *Michigan Consolidated*, supra, which is quoted by the McCombs Group and du Pont and repeated hereinabove is followed immediately by the statement,

> "Indeed, the proposal appears prima facie to have merit enough to have required the Commission *at some stage of the proceeding* to consider it on its own initiative as an alternative . . . [Emphasis added]."

Although United no longer supports the settlement proposal, at least insofar as it relates to the McCombs Group, we believe that so long as the offer remains open Judge Howe should continue to consider it on its merits as an alternative to the disposition of this proceeding set out in Opinion No. 740 and modified herein. A settlement by its nature involves give and take, including human estimates of the likelihood of prevailing and of the likelihood of realizing the fruits. As a result, some may view a given settlement as providing benefits which are at least equal to those which would have been won while others may view the same settlement as merely approaching those benefits. The question, as we see it in this proceeding, is whether the settlement strikes a fair bargain under all of the circumstances, including our decision in Opinion No. 740 and

modified herein as to United's natural gas entitlements. Gas in United's pipeline may well be worth the right to receive twice as much from the field provided, of course, that the field and producer records are opened sufficiently to permit an informed judgment as to the prospects of United's customers' realizing the fruits of United's litigation.

9. We agree that United's withdrawal of its support for the settlement proposal renders the proposal ineffective *as a settlement* of so much of this proceeding as pertains to the McCombs Group. Nonetheless, we believe that as long as the members of the McCombs Group hold open the offer which is embraced by the settlement proposal the presiding administrative law judge should continue to consider the proposal *on its merits* as one of the possible alternative dispositions of this proceeding. *Michigan Consolidated Gas Company* v. *Federal Power Commission*, 238 F.2d 204, cert. den. 364 U.S. 913 (1960). Such consideration would not, of course, prevent the presiding judge from modifying or totally rejecting the proposal upon ventilation of its merits.

10. On May 8, 1975, when the settlement proposal was submitted to us, the record in this proceeding was incomplete for the purpose of determining the volumes of United's natural gas entitlements and suitable rates respecting the Butler B lease. We could not consider the merits of the settlement proposal partly because it embraced wells and mineral leases which had not previously been involved in this proceeding and partly because of the state of the record with respect to United's natural gas entitlements and, as a result, on June 17, 1975, we set the matter to hearing before an administrative law judge "for the purpose of receiving and considering evidence to support the proposed settlement . . . fully on its merits". Formal development of the record had not been commenced when we issued Opinion No. 740 on August 20, 1974, and, consequently, that opinion is not a final decision as to volumes

and rates and remands the proceeding to develop a record in those areas.

11. Further development of the record is necessary for the ultimate disposition of this proceeding. Although United does not support the pending settlement proposal or offer, as the case may be, with the members of the McCombs Group and du Pont, apparently it continues to support the separate pending settlement proposals with Louis H. Haring, Jr. and National Exploration Company. It seems to us that the determination of volumes and rates under Opinion No. 740 and modified herein is intertwined with the question of whether any or all of the foregoing are in the public interest and, therefore, that the more efficient procedure would be to develop the record with respect to all of these questions, and to consider all of them, at one time. In any event, we believe that we are proceeding properly under *Michigan Consolidated*, supra, to consider the settlement on its merits as an alternative to the disposition of this proceeding set out in Opinion No. 740 and modified herein. Accordingly, we find no merit in the McCombs Group's and du Pont's alleged error.

The Dissolution of Units Error

12. The McCombs Group and du Pont assert that we did not have before us and hence failed to consider the dissolution of McCombs-Butler Gas Unit Nos. 1 and 2 subsequent to the hearing and Judge Levy's Initial Decision. They assert that we failed to consider reserve and production data respecting the Butler B lease and the reserves offered in settlement, and further, that evidence pertaining to these matters was admitted into the record at a hearing before Judge Howe on August 28 and 29, 1975.

13. Their claim is self-defeating since it shows on its face that we did not have the evidence in question before us and, therefore, that we could not have erred in failing to consider it. Furthermore, the evidence in question had

not been admitted into the record on August 20, 1975, the date on which Opinion No. 740 was issued, and after it was admitted that part of the record remained before Judge Howe. Apparently anticipating the latter objection, the McCombs Group and du Pont submitted a copy of the record as developed on August 28 and 29, 1975, as an appendix to their application for rehearing; but on reading it we find, particularly in the light of the alleged surprises and insufficient time to prepare for cross-examination, Judge Howe's ruling to allow further cross-examination when the hearing resumes and the data requests made therein, that the record as developed on August 28 and 29, 1975, is only part of the overall record to be developed pursuant to our order of June 17, 1975, and Opinion No. 740. Accordingly, the record is still incomplete for the purpose of considering the settlement proposal or offer, as the case may be, on its merits.

14. While we therefore find no merit in the McCombs Group's and du Pont's alleged error, they have placed before us evidence of the dissolution of McCombs-Butler Gas Unit Nos. 1 and 2. And although that evidence has not been fully tested or rebutted, we find, nonetheless, that it is substantial in the legal sense and that we should consider modifying Ordering Paragraph (A) of Opinion No. 740 which directs the respondents to begin to deliver natural gas to United from those gas units.

15. The staff asserts that while the effectiveness of the dissolution of the McCombs-Butler Gas Unit Nos. 1 and 2 is not clearly established as a matter of state law, neither is it relevant. Citing Opinion No. 467 *(Cumberland Natural Gas Company, Inc., et al.,* Docket Nos. G-18740 *et al.*), 34 FPC 132 (1965) and *Atlantic Richfield Company, FPC Gas Rate Schedule Nos. 337 and 354,* 50 FPC 258 (1973), and analogous situations, the staff takes the position that Section 7(b) of the Natural Gas Act applies to the dissolution of the units since such dissolution would effect a partial abandonment of service. It points out, in

this connection, that witness Bill Forney, Jr.[2] testified (Tr. 387-388) that it was fair to say that the paramount reason for dissolving the units was the possibility that the Federal Power Commission might direct the delivery of reserves produced from the Butler A lease to United and, according to the staff, it is difficult to regard the dissolution as anything more than an attempt to evade the Commission's jurisdiction.

16. United takes the position that the record as developed on August 28 and 29, 1975, is insufficient to show that the units have been dissolved, and further, that even if the units were dissolved on October 21, 1974, the date on which the instrument entitled "Dissolution of Units" was recorded, such dissolution could not retroactively alter United's rights under the Natural Gas Act.

17. In a response filed October 3, 1975, the McCombs Group and du Pont assert that United can have no rights to Butler A gas under the Natural Gas Act because there were no deliveries of natural gas in interstate commerce from a unitized Butler B lease, and further, that the creation and dissolution of pooling units come within the "production or gathering" exemption of Section 1(b) of the Natural Gas Act. They say that the units were dissolved to prevent United from enjoying a windfall since the Butler A and B leases would not have been pooled if the respondents had been aware of United's claim to the Butler B gas.

18. In reliance upon *The United Gas Improvement Company* v. *Continental Oil Company, et al.,* 381 U.S. 392 (1965), we believe that the "production or gathering" exemption of Section 1(b) relates to the physical activities, processes and facilities of production or gathering, but not to sales affirmatively subjected to Commission jurisdiction, including the formation and dissolution of production

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[2] Not to be confused with respondent Bill Forney, his father.

units and certificate obligations under the Natural Gas Act.

19. McCombs-Butler Gas Unit Nos. 1 and 2 were apparently formed to obviate the drilling of offset wells on the Butler B lease to prevent the drainage of reservoirs underlying both the Butler A and B leases through wells which had been completed on the Butler A lease. And the significant economic fact appears to be that the dissolution of those units was motivated by the possibility that we might order the members of the McCombs Group to deliver to United the gas which they are producing from the Butler A lease and selling to du Pont at a current price of $1.04 per Mcf, subject to a Btu adjustment. By way of comparison, the current maximum national rate under Opinion No. 699 is $.52 per Mcf and the current maximum rate for small producers under Opinion No. 742, infra, is 130% of that rate, or $.676 per Mcf.

20. We do not subscribe to the staff's position that dissolution of those units requires our abandonment authorization under Section 7(b) of the Natural Gas Act. Let us assume hypothetically that United is entitled to receive 100% of the natural gas which is produced from Whiteacre, a one-acre leasehold which is dedicated to interstate commerce; that Whiteacre is unitized with Blackacre, a three-acre leasehold which is not so dedicated; and, consequently, that United becomes entitled to receive 25% of the natural gas which is produced from Grayacre, the resulting four-acre unit. We could take the position that United's loss of 75% of the Whiteacre gas incident to the formation of Grayacre requires our abandonment authorization under Section 7(b). Similarly, we could take the position, suggested by the staff, that if Grayacre is dissolved United's loss of 75% of the Grayacre gas attributable to Blackacre (which could also be described as its entire 25% interest in the Blackacre gas) requires our abandonment authorization. We did not take the first of

these positions in Opinion No. 740, rationalizing in paragraph 63 that there is an offsetting *quid pro quo* when a unit is formed. Similarly, we believe that there is an offsetting *quid pro quo* when a unit is dissolved, for United will again become entitled to receive 100% of the gas produced from Whiteacre, and we would thereby distinguish *Cumberland* and *Atlantic Richfield*, supra.

21. If we recognize the attempted dissolution of those units for the purpose of the Natural Gas Act we would thereby leave the Butler B lease, which is dedicated to interstate commerce, in a disadvantaged position, as its underlying natural gas reservoirs are being drained by wells on the Butler A lease. In our view the significant economic fact set out in the second preceding paragraph is also the determinative fact, and in reliance upon *The United Gas Improvement Company*, supra, tentatively, we will not recognize the attempted dissolution for the purpose of the Natural Gas Act and, in particular, for the purpose of determining an appropriate modification of Ordering Paragraph (A) of Opinion No. 740.[3] We realize that the record may be incomplete with respect to the reason(s) for the attempted dissolution of the units, but if it should turn out that there were bona fide other reasons for dissolving them and, consequently, that United is entitled to less gas than it will receive under Ordering Paragraph (A) of Opinion No. 740 as modified herein, any excess deliveries to United can be offset against the volumes to which it is entitled under Ordering Paragraph (B) of Opinion No. 740.

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[3] Under ordinary circumstances we would say that the parties in interest are free to form and dissolve natural gas producing units at will when the leaseholds and agreements underlying a particular certificate of public convenience and necessity authorize such action. However, we view the situation before us as extraordinary since the attempted dissolution apparently was not motivated by technical and economically related considerations.

22. We said in our order issued herein on September 18, 1975, "We will modify Ordering Paragraph (A) [of Opinion No. 740] to fit the present circumstance that the major portion of the Butler B lease may no longer be unitized." Tentatively, and subject to our further order, we find that the Butler B lease continues to be unitized for the purpose of the Natural Gas Act to the same extent as immediately prior to the attempted dissolution of McCombs-Butler Gas Unit Nos. 1 and 2. Accordingly, we will modify Ordering Paragraph (A) to carry out its original intent while avoiding the *sub silentio* references therein to McCombs-Butler Gas Unit Nos. 1 and 2, to provide a new commencement date for the sales and deliveries specified therein in the light of our limited stay and to provide for new pricing mechanism in view of the issuance of Opinion No. 742 on August 28, 1975, amending Section 157.40 of the Commission's Regulations Under the Natural Gas Act to provide just and reasonable rate differentials for sales of natural gas by holders of small producer certificates of public convenience and necessity.[4]

MOTION FOR STAY

23. The McCombs Group and du Pont ask for a stay of the ordering provisions of Opinion No. 740 claiming, among other matters, that they would be irreparably injured in the absence of a stay:

> "The order directing deliveries to United disrupts the McCombs Group's existing contractual relationship with du Pont, and has serious consequences on the parties, involving several millions of dollars, which are impossible to repair. The McCombs Group would be required to receive payment for gas delivered to United at a rate far less than the current ap-

[4] We will also modify Ordering Paragraph (C) of Opinion No. 740 in view of the issuance of Opinion No. 742.

> plicable contract price of $1.04 per Mcf under the du Pont contract. Du Pont will be deprived of gas which it is rightfully entitled to receive, and which cannot be repaid. Similarly, the McCombs Group may be subjected to claims for damages from its royalty and overriding royalty interest owners, and from du Pont. A more clear case of irreparable injury is difficult to conceive."

Taking opposite positions to the McCombs Group and du Pont under *Virginia Petroleum Jobbers Association* v. *Federal Power Commision*, 259 F.2d 921 (CADC, 1958), United and the staff assert that if a stay is granted United and its customers would be injured in a far more substantial manner than the McCombs Group and/or du Pont if a stay is denied. Except for the unsupported claim that du Pont would be deprived of gas which cannot be repaid, it seems to us that each of the foregoing items of alleged injury is compensable in money damages and, consequently, that they do not rise to the status of irreparable injury in the legal sense. And while admittedly gas is getting more difficult to purchase and commensurately more expensive, we are not prepared to conclude in the absence of a special showing that the gas cannot be replaced by du Pont in kind and, if not, that du Pont would be irreparably injured by its inability to replace the gas.

24. In our order issued in this proceeding on September 18, 1975, we stayed the commencement of the sale and deliveries of natural gas pursuant to Ordering Paragraph (A) of Opinion No. 740 in order to afford an opportunity to respond to the issues raised by the McCombs Group and du Pont in their application for rehearing and motion for stay and to allow time for consideration of those issues. That time expires with the issuance of this Opinion No. 740-A on rehearing, and we are dissolving our stay in Ordering Paragraphs (A) and (D) hereof.

BUTLER A LEASE

25. As noted in paragraph 5 of Opinion No. 740, the 1953 Gas Purchase Contract was amended on September 7, 1954, shortly before Bee Quin filed her certificate applications, to embrace additional leaseholds and provide for the sale of oil-well gas. In its answer filed October 3, 1975, the staff asserts that the Butler A tract was included in the Bee Quin dedications when she applied in Docket Nos. G-2997 and G-2998 for certificates of public convenience and necessity, and that the natural gas underlying the Butler A lease through which the McCombs Group, du Pont and respondent Louis H. Haring, Jr., claim their interests, is dedicated to United in interstate commerce. The staff notes, in this connection, that in Opinion Nos. 737 (*El Paso Natural Gas Company, et al., Docket Nos. CP75-209,* et al.), issued July 11, 1975,[5] the Commission said,

> "[I]t makes no difference whether a lease is transferred or terminates, the obligation of service imposed on the dedicated gas continues."

26. T.L. Aubin, Jr., General Manager of United's Gas Acquisition Department, testified (Tr. 118):

> "If I am not mistaken we did purchase gas off the Butler A tract. If I recall it was a tract that was subject to the specific contract in question here."

That contract as amended on September 7, 1954, embraces the following leasehold described therein:

> "That certain oil, gas and mineral lease dated April 20, 1948, from Hallie Butler Hunter, et al, lessor, to W.R. Quin, lessee, covering 150 acres of land in Karnes County, Texas, said lease being recorded in Volume 175, Page 198, Deed Records, Karnes County, Texas, reference being made to said lease and the record thereof for all purposes."

[5] Rehearing denied, Opinion No. 737-A, issued September 3, 1975.

Judging from the acreage, location, date and parties, it would appear, and we conclude, that the foregoing is a description of a lease of the Butler A tract. Counsel for United stated, in this connection, (Tr. 120) that the Butler A tract was under the 1953 Gas Purchase Contract, that the lease pertaining thereto expired for lack of production and that "the right to purchase gas would have likewise expired with the expiration of the lease." Immediately prior to counsel's statement Judge Levy refused to allow the proceeding to expand into the Butler A tract stating, "We are only concerned here with the Butler B tract, as I understand it."

27. The staff asserts, additionally, that there is no record in the Commission's files of an application for abandonment of the service obligation.

28. Although United has not heretofore claimed Butler A gas as being dedicated to it in interstate commerce under in [*sic*] 1953 Gas Purchase Contract, we are satisfied that it would be in the public interest to explore this previously unlitigated issue raised by the staff, particularly in the light of the unitization of portions of the Butler A and B leases and the attempted dissolution of those units. If for example, natural gas underlying the Butler A tract is ultimately found to have been dedicated to United in interstate commerce to the same extent as the natural gas underlying the Butler B tract, then United would be entitled under the Natural Gas Act to receive all of the gas produced from those two tracts, and the issues pertaining to the attempted dissolution of the units would become moot.

29. We are, therefore, dividing this proceeding into Phase I to consider the possible dedication of Butler A gas, including the scope of that dedication, if any, and Phase II to consider all of the remaining issues herein,

including the merits of the settlement proposal or offer, as the case may be, and the issues on remand. Because Phase I may be determinative of much of Phase II and could result in our ordering the McCombs Group to deliver Butler A gas to United, we ask Judge Howe to schedule and decide Phase I on on expedited basis. Among other matters in Phase I, we would expect that a copy of the 1948 lease of the Butler A tract would be introduced into evidence and, on the assumption that the parties rely on Bee Quin's applications in Docket Nos. G-2997 and G-2998 to establish the scope of her dedications of Butler A gas, if any, that the evidentiary defects discussed in Opinion No. 740 will be cured.

30. All of the present respondents shall be the respondents in both Phase I and II, except National Exploration Company which has no apparent interest in the Butler A lease and, therefore, will continue as a respondent in Phase II only.[6] In view of the formation in 1974 of a Texas corporation called Bill Forney, Inc., and the assignment to it of many of respondent Bill Forney's interests, the staff should consider appropriate action toward naming that corporation and possibly its stockholders as respondents in both phases.[7] And to make sure that any other interested persons are given an opportunity to intervene and participate in Phase I the Secretary should prepare and cause to be published notice of this opinion and order establishing Phase I to litigate the possible dedication to interstate commerce of the natural gas underlying the Butler A tract.

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[6] Nonetheless, National Exploration Company should be allowed to participate in Phase I, if it so chooses, in connection with the evidentiary defects pertaining to Bee Quin's certificate applications.

[7] Apparently Bill Forney should remain a respondent because of his personal involvement, but consideration should be given to redesignating his name as Bill Forney, Sr.

MOTION FOR EMERGENCY RELIEF PENDENTE LITE

31. On September 24, 1975, the McCombs Group filed a motion pursuant to § 1.12 of our Rules of Practice and Procedure asking for "emergency relief *pendente lite* in order to preserve the leases covering certain wells committed to the settlement proposal pending herein."

32. The McCombs Group asserts, among other matters, that the settlement proposal before Judge Howe contemplates that the McCombs Group will sell and deliver to United the natural gas which is produced from five wells, including the Basin Petroleum Corporation No. 1 Marie Fruge Well (the Fruge Well), N.W. Chalkley Field, Calcasieu Parish, Louisiana, and the Bill Forney No. 1 Wychopen Well (the Wychopen Well), unnamed field, Wharton County, Texas; that the reserves underlying the two wells constitute 82.1% of the reserves which are offered in settlement; that neither well is being operated currently and, consequently, the oil and gas leases covering those wells are in danger of expiration for failure to produce; and that the McCombs Group is attempting to keep the underlying leases in force through shut-in royalty payments.

33. The McCombs Group asserts, additionally, that in the case of the Fruge Well, the underlying leases authorize such payments until April 1977 under circumstances when the operator is "unable to produce . . . because of lack of market or marketing facilities or Governmental restrictions". If we understand the McCombs Group correctly, it is uncertain as to whether such legal circumstances exist in fact and therefore it would prefer to preserve the underlying leases in a more certain manner by recommencing production and selling and delivering the natural gas to United. In the case of the Wychopen Well, the period of shut-in royalty payments apparently expired on August 3, 1975, and therefore the McCombs Group is in more grave danger of losing the underlying lease. Finally, the McCombs Group asserts that it is willing to sell and deliver the gas produced

from the underlying leases to United pending resolution of the issues in this proceeding on the condition that it receives credit for the volumes so delivered and, if the settlement proposal is not approved, if "the producers involved may thereupon abandon sales to United from these leases".

34. United, on September 24, 1975, filed a response indicating that it has a critical need for additional gas supplies and that the McCombs Group may have a limited ability to sell and deliver to it the volumes specified by Ordering Paragraph (B) of Opinion No. 740. "Therefore, United believes that the public interest may be served by a Commission order permitting United to receive such volumes as will be available from this acreage, pending final resolution of all of the issues involved herein."

35. In its answer filed October 3, 1975, the staff supports the motion to the extent that it would result in the commencement of deliveries of natural gas to United at an early date and asserts, in effect, that abandonment should be tied to the resolution of the respondents' obligations rather than the decision on the settlement. Additionally, the staff suggests a rate under Opinion No. 742, supra, subject to refund.

36. Although we favor the McCombs Group's proposal to begin selling and delivering natural gas to United from the Fruge and Wychopen Wells, we believe that such sales and deliveries should be based on the following principles: (1) The McCombs Group will receive volumetric credits against its natural gas obligations as ultimately decided or settled in this proceeding, and United will receive monetary credits against its payment obligations as ultimately decided or settled herein. (2) Subject to refund, United will pay for the natural gas which it receives from the Fruge and Wychopen Wells at a rate which is within the parameters of Section 157.40 of the Commission's Regulations Under the Natural Gas [*sic*] as presently amended by Opinion No. 742 issued August 28, 1975, and as amended

from time to time. (3) The McCombs Group will be authorized to abandon its sales and deliveries to United from the Fruge and Wychopen Wells upon satisfaction of its natural gas obligations as ultimately decided or settled in this proceeding.

37. Since the foregoing principles differ from those proposed by the McCombs Group and, in any event, since United has withdrawn its support of the settlement proposal insofar as the McCombs Group is concerned, we believe that we do not have a specific proposal before us for approval. Accordingly, we will neither grant nor deny the McCombs Group's motion for emergency relief *pendente lite*. The McCombs Group, United and the staff seem to be in substantial accord with respect to sales from the Fruge and Wychopen Wells in partial satisfaction of the McCombs Group's obligations to United and, therefore, we urge them to come to an agreement embracing the foregoing principles and to submit it by consent motion for our approval.

APPEAL OF ADMINISTRATIVE LAW JUDGE'S ORDER

38. On September 25, 1975, the McCombs Group filed an appeal pursuant to § 1.28(a) of our Rules of Practice and Procedure [a] asking us to modify Judge Howe's Order With Respect to Testimony and Production of Data issued September 15, 1975. The appeal is not well taken since the McCombs Group does not allege any "extraordinary circumstances where prompt decision by the Commission is necessary to prevent detriment to the public interest" as required by § 1.28(a).

39. Even turning to the McCombs Group's specific complaints, which we are not obliged to do under the circum-

[a] Although the filing recites that it is filed pursuant to § 1.7(d) of our Rules of Practice and Procedure, we find that that is an incorrect section for the filing in question.

stance, we are unable to find any such extraordinary circumstances. If some of the data to be produced by the McCombs Group embraces dedicated reserves which are not available to United's system, there is no showing that that fact has been explained to Judge Howe and that he has been given an opportunity to reconsider his order. Furthermore, we do not read into Judge Howe's order any requirement to produce individual financial statements, and we see nothing unreasonable in requiring the production of data pertaining to recent, current and future exploration and development expenditures, together with the results of recent and current expenditures. Since the settlement proposal or offer includes an agreement by the McCombs Group to spend not less than $500,000 in the exploration of additional reserves for United, Judge Howe may wish to have record evidence of the respective financial and natural gas resources of the members of the McCombs Group in connection with his determination as to whether or not the settlement proposal or offer is in the public interest.

United's Protest

40. On October 8, 1975, United filed a protest of the McComb's Group's alleged response to Ordering Paragraph (C) of Opinion No. 740 and a motion for an order directing the McCombs Group to comply immediately with that provision. The McCombs Group and du Pont, in an answer filed October 16, 1975, claim that the former has "fully complied" with that provision.

41. Upon reviewing United's protest and the McCombs Group's alleged lack of compliance together with the McCombs Group's and du Pont's answer, we find that part of the dispute between them arises from the McCombs Group's attempted retroactive dissolution of McCombs-Butler Gas Unit Nos. 1 and 2 which, tentatively, will not be recognized for the purpose of the Natural Gas Act, and that part arises from the McCombs Group's reliance upon

the settlement proposal, from which United subsequently withdrew its support, as satisfying a plan to carry out Ordering Paragraph (B) of Opinion No. 740 and the evidence to support that plan. We will, therefore, modify Ordering Paragraph (C) of Opinion No. 740 with a view toward obviating this dispute and giving Judge Howe explicit authority to take appropriate action to assure compliance with that provision.[9] Accordingly, we will deny United's motion without prejudice.

Motion for Reconsideration

42. On October 14, 1975, the McCombs Group and du Pont filed a motion asking us to reconsider the Order Granting Rehearing for Further Consideration and Limited Stay issued September 18, 1975, and, upon reconsideration, to approve the pending settlement proposal. Much of their motion is, in effect, a response to United's answer filed October 3, 1975, to their application for rehearing, and, as such, it is an unauthorized filing and need not be considered to that extent. Furthermore, their motion is based on the incorrect premise that our order issued September 18, 1975, "granted rehearing for [the] purpose of further consideration of the settlement proposal." The McCombs Group and du Pont had alleged, among other matters in their application for rehearing, that we erred in Opinion No. 740 in failing to consider the pending settlement proposal, and we granted rehearing on September 15, 1975, to consider that alleged error, among others. But consideration of that alleged error does not involve the same issues as consideration of whether or not to approve

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[9] The McCombs Group and du Pont assert in their answer that the former, on October 9, 1975, transmitted certain data covered by Ordering Paragraph (C) to the Commission staff pursuant to the staff's data request. We do not regard that transmission of information to the staff as compliance with Ordering Paragraph (C) unless that information was also *filed* of record as required by that provision.

the settlement proposal. Contrary to the McCombs Group's and du Pont's assertion in their motion for reconsideration that "a full factual record was developed in support of the settlement" on August 28 and 29, 1975, we believe, for the reasons hereinabove discussed, that the total record developed in this proceeding before Judges Levy and Howe is not yet ripe for the purpose of considering the merits of the settlement proposal or offer, as the case may be. And we believe that Phase I of this proceeding, which considers questions pertaining to the possible dedication of the natural gas underlying the Butler A tract, may well affect the decision in Phase II of whether the McCombs Group's and du Pont's proposal is in the public interest. We will, therefore, deny the McCombs Group's and du Pont's motion for reconsideration.[10]

The Commission further finds:

(1) The assignments of error and grounds for rehearing set forth in the McCombs Group's and du Pont's application for rehearing and motion for stay present no facts or legal principles which would warrant any change in or modification of Opinion No. 740 and order issued August 20, 1975, except as that Opinion and order is modified and clarified herein.

(2) In the light of developments, the McCombs Group's motion for emergency relief *pendente lite* does not present a specific proposal for which relief can be granted.

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[10] In a response filed October 28, 1975, United argues that under the "Limited Cross Conveyance Deed" filed as Appendix B to the McCombs Group's and du Pont's motion for reconsideration "each of the royalty and overriding royalty owners will continue to share in production from the Butler A and Butler B leases in the same percentage as they shared in such production prior to the so-called 'Dissolution of Units.'" Its consequent argument that we should give effect to substance over form and not recognize the attempted dissolution of the units for the purpose of the Natural Gas Act is properly addressed to Judge Howe.

The Commission orders:

(A) Ordering Paragraph (A) of Opinion No. 740 and order issued August 20, 1975, is modified to read as follows:

"(A) Billy J. McCombs, R. James Stillings d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corporation, Louis H. Haring, Jr., National Exploration Company and Bill Forney, all of whom are respondents herein and holders of small producer certificates of public convenience and necessity, shall sell and deliver to United Gas Pipe Line Company in interstate commerce in compliance with the Commission's certificate in Docket No. G-12694, not less than (1) 42.9658% of the natural gas produced from the Butler A tract and the east 113 acres of the Butler B tract below a depth of 6,500 feet and above a depth of 8,640 feet, (2) 52.0767% of the natural gas produced from the Butler A and B tracts below a depth of 8,700 feet and above a depth of 9,700 feet and (3) 14.2045% of the natural gas produced from the unnamed gas unit embracing the west 50 acres of the Butler B tract from a depth of 4,115 feet to a depth of 8,700 feet, all of said sales and deliveries to commence 15 days after the date of this opinion and order on rehearing, or as soon thereafter as United Gas Pipe Line Company physically connects gathering facilities to receive the gas, at interim rates subject to refund which are equal to the maximum rates applicable to holders of small producer certificates of public convenience and necessity under Section 157.40 of the Commission's Regulations Under the Natural Gas Act as presently amended by Opinion No. 742 issued August 28, 1975, and as amended from time to time."

(B) Ordering Paragraph (C) of Opinion No. 740 and order issued August 20, 1975, is modified to read as follows:

"(C) The record of this proceeding is reopened and the said respondents shall file within 15 days after the date of this opinion and order on rehearing, or within such longer period of time as may be determined by an admini-

strative law judge (1) data commencing in 1971 showing the volumes of natural gas which were produced from each well in the Butler A and B tracts, identifying the respective wells and tracts, to and including October 21, 1974, and, separately, to a recent specified date (which shall be made current as determined by an administrative law judge from time to time), including the evidence specified in paragraph 65 of Opinion No. 740, and also showing the respective amounts delivered to United Gas Pipe Line Company and the respective amounts delivered to others, naming them; (2) a plan or plans to carry out Ordering Paragraph (B) of Opinion No. 740 separate and apart from any proposal or offer to settle the proceeding generally, (3) their evidence to support such plan or plans and (4) copies of contracts establishing a rate or rates for the sales specified in Ordering Paragraphs (A) and (B) of Opinion No. 740, as the former is modified herein, within the parameters of Section 157.40 of the Commission's Regulations Under the Natural Gas Act as presently amended by Opinion No. 742 issued August 28, 1975, and as amended from time to time, or, if agreement within those parameters is not reached, such other filings selected by them (separate and apart from any proposal or offer to settle the proceeding generally) to establish a rate or rates for the said sales including possibly an application or applications under Section 154.92(d) of the Commission's Regulations Under the Natural Gas Act for a successor certificate or certificates which would affect a termination of the certificate in Docket No. G-12694 and establish a rate or rates for the said sales, in any case, together with their evidence to support the said rate or rates. The presiding administrative law judge is authorized to take appropriate action to assure compliance with this paragraph."

(C) The application for rehearing of Opinion No. 740 filed by Billy J. McCombs, R. James Stillings d/b/a Gasstill Company, David A. Onsgard, Basin Petroleum Corporation, Bill Forney and E.I. du Pont de Nemours & Company on September 11, 1975, is denied.

(D) The stay of the commencement of the sale and deliveries of natural gas pursuant to Ordering Paragraph (C) of the Commission's order issued herein on September 18, 1975, is hereby dissolved as of the date specified in Ordering Paragraph (A) of this Opinion No. 740-A on rehearing.

(E) This proceeding is divided into Phase I which shall consider all questions pertaining to whether or not the natural gas underlying the Butler A tract is dedicated to United Gas Pipe Line Company in interstate commerce and, if so, the extent of such dedication, and Phase II which shall consider all of the remaining questions in this proceeding. Public notice of this action affecting the Butler A tract shall be given and published forthwith.

(F) The appeal of the presiding administrative law judge's order with respect to testimony and the production of data filed by Billy J. McCombs, R. James Stillings d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corporation and Bill Forney on September 25, 1975, is denied.

(G) The motion filed by United Gas Pipe Line Company for an order directing Billy J. McCombs, R. James Stillings d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corporation and Bill Forney to comply immediately with Ordering Paragraph (C) of Opinion No. 740, is denied without prejudice.

(H) The motion for reconsideration filed by Billy J. McCombs, R. James Stillings d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corporation, Bill Forney and E.I. du Pont de Nemours & Company on October 14, 1975, is denied.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

(CAPTION OMITTED IN PRINTING)

OPINION NO. 740-B

Opinion and Order Denying Rehearing

(Issued January 19, 1976)

1. On December 8, 1975, United Gas Pipe Line Company (United) filed an application pursuant to Section 19(a) of the Natural Gas Act and § 1.34 of our Rules of Practice and Procedure asking us to grant rehearing of Opinion No. 740-A [1] issued November 7, 1975, to the extent necessary to eliminate from consideration in Phase II of the remanded proceeding (1) questions pertaining to the reasons for the McCombs Group's [2] attempted dissolution of McCombs-Butler Gas Unit Nos. 1 and 2 and (2) the question of whether or not the McCombs Group's settlement proposal, which was initially supported and later rejected by United, is in the public interest. At the threshold, we will accept United's explanation that although applications for rehearing of opinions on rehearing are ordinarily inappropriate, such an application is appropriate in this instance because the issues raised by United were first addressed by us in Opinion No. 740-A on rehearing.

2. Referring to our statement in paragraph 19 of Opinion No. 740-A that the significant economic fact appears to be that the dissolution of McCombs-Butler Gas Unit

[1] Entitled "Opinion and Order Denying Rehearing, Modifying Ordering Provisions, Dissolving Stay, Noticing Phasing of Proceeding, Acting on Emergency Relief, Denying Appeal, Denying Without Prejudice Compliance Order and Denying Reconsideration."

[2] Respondents Billy J. McCombs, R. James Stillings d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corporation and Bill Forney.

Nos. 1 and 2 was motivated by the possibility that the Federal Power Commission might order the members of the McCombs Group to deliver to United the gas which they are producing from the Butler A lease and selling to respondent E.I. du Pont de Nemours & Company (du Pont) at a current price of $1.04 per Mcf, subject to a Btu adjustment, United asserts in its application (footnote omitted),

> "United fully supports this finding and believes that no other conclusion could have been reached on the record before the Commission. Yet, the Commission went on to state [in paragraph 21] that 'the record may be incomplete with respect to the reason(s) for the attempted dissolution of the units' and directed consideration in Phase II of 'whether there were bona fide other reasons for dissolving' the units. United believes that in so doing the Commission committed error.
>
> "The record before the Commission unequivocally shows that the *only* reason for the McCombs Group's attempt to dissolve the Butler Unit Nos. 1 and 2 was the understandable fear that the Commission would require delivery of Butler A gas to United as a result of its unitization with the Butler B tract.
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> "[T]he Commission should find, as the record shows, the attempted dissolution was merely a 'sham' undertaken in an effort to defeat Commission jurisdiction."

3. We concur with United that no other conclusion could have been reached on the basis of the record which was before us when we decided Opinion No. 740-A. But, as noted in that opinion and order, the evidence pertaining to the attempted dissolution of the units was admitted and developed as part of the record on August 28 and 29, 1975, and the record as developed on those dates is only part of the overall record to be developed pursuant to our order of June 17, 1975, setting the proposed settlement to hearing, and Opinion No. 740. Furthermore, the record as

developed on August 28 and 29, 1975, was not certified to us by Presiding Administrative Law Judge Thomas L. Howe at the conclusion of some particular facet of this proceeding; instead, it was brought to our official attention by the McCombs Group and du Pont, *during the course of the presentation and testing of evidence,* as an appendix to their application for rehearing of Opinion No. 740. And while we noted in paragraph 15 of Opinion No. 740-A that witness Bill Forney, Jr. (son of respondent Bill Forney) testified that it was fair to say that the paramount reason for dissolving the units was the possibility that the Federal Power Commission might direct delivery of reserves produced from the Butler A lease to United, we also noted in paragraph 13 that during the course of the hearing on August 28 and 29, 1975, there were allegations of surprise and insufficient time to prepare for cross-examination, and Judge Howe had ruled that he would allow further cross-examination when the hearing resumed. Further cross-examination could have led to further re-direct examination and, consequently, to a modification of witness Forney's testimony or the presentation of other witnesses who might have nullified or refuted his testimony. In summary, we reject United's contention that we erred, because the record which was before us when we decided Opinion No. 740-A was in the process of development and we could not have known at that time what other possible evidence on the dissolution question might have shown.

4. United argues, additionally, that "counsel for the McCombs Group has informed the Presiding Judge and the parties to this proceeding [presumably subsequent to the issuance of Opinion No. 740-A] that the McCombs Group does not intend to put in *any* additional evidence with respect to the reasons for the attempted dissolution." If that is so, and in the absence of countervailing information we do not question the veracity of United's statement, then such information is not yet officially before us and

cannot form the basis for an error in Opinion No. 740-A. Other than United's claims that the outcome of the dissolution issue is certain and that that issue "will merely complicate further proceedings", United advances no reason why we should not permit Judge Howe to decide that issue as part of his overall decision of Phase II of this proceeding.[3] In the absence of any such cogent reasons we choose not to take measures to bring that information before us officially as we believe that the piecemeal decision of issues in this proceeding would serve to hinder rather than advance the administrative process.

5. In Opinion No. 740-A we said that the dissolution of McCombs-Butler Gas Unit Nos. 1 and 2 does not require our abandonment authorization under Section 7(b) of the Natural Gas Act. Upon further consideration, we now believe that it does and that unless and until such authorization is given, the attempted dissolution of those natural gas producing units should not be recognized for the purpose of the Natural Gas Act.

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[3] In *McCombs, et al.* v. *Federal Power Commission,* No. 75-1829 filed November 14, 1975, the United States Court of Appeals for the Tenth Circuit has issued a stay of Ordering Paragraph (A) of Opinion No. 740-A directing the delivery of natural gas to United. We suspect that United's unstated reason for seeking rehearing on the dissolution issue is to obtain a firm Commission ruling, or at least stronger Commission statements, on that issue prior to the Tenth Circuit's consideration of this matter on the merits. In this respect, and as discussed in connection with the settlement proposal issue, infra, United's request seems to be in the nature of a motion to reach a different result on the dissolution issue on the basis of something which occurred after we decided and issued Opinion No. 740-A. It would be inappropriate to grant the relief which United requests without giving the members of the McCombs Group and the other participants an opportunity to respond in the nature of an answer to a motion under § 1.12(c) of our Rules of Practice and Procedure or in the nature of an answer to an application for rehearing after granting rehearing for further consideration under § 1.34(d) thereof.

6. The Commission found in Opinion No. 740 that the certificate in Docket No. G-12694 under which United is entitled to the natural gas involved in this proceeding is broad enough to cover both (1) the gas which is produced from wells on the Butler B lease, and (2) a proportionate part of the gas which is produced from wells on units which include any part of the Butler B lease. When a unit embracing the Butler B lease, or a part of the Butler B lease, is formed, a proportionate part of the reserves underlying the Butler B lease is withdrawn from interstate commerce, but such withdrawn reserves are offset, in whole or in part, by the proportionate parts of the reserves underlying the other leaseholds within the unit. Similarly, when such a unit is dissolved the proportionate parts of the reserves underlying the other leaseholds within the unit are withdrawn from interstate commerce, but such withdrawn reserves are offset, in whole or in part, by the proportionate part of the reserves underlying the Butler B lease. In Opinion No. 740-A we focused on the foregoing withdrawals of reserves from interstate commerce and said, in effect, that because of the offsetting additions to interstate commerce such withdrawals should not require Section 7(b) abandonment authorization.[4]

7. We continue to adhere to our position that the withdrawal of reserves from interstate commerce incident to the formation or dissolution of McCombs-Butler Gas Unit Nos. 1 and 2 does not require our abandonment authorization, at least to the extent that the formation or dissolu-

[4] Utilizing the example in Opinion No. 740-A, and assuming that the surface boundaries of Whiteacre (dedicated) and Blackacre (not dedicated) are identical percentagewise to the subsurface limits of the underlying natural gas reservoirs, United would appear to be entitled to the same amount of gas from the same reservoirs whether it is entitled to receive 100% of the gas from 25% of the reservoirs (prior to the formation of the Grayacre unit, or after its dissolution), or 25% of the gas from 100% of the reservoirs (during the existence of the Grayacre unit).

tion of those units represents nothing more than a realignment of entitlement percentages applicable to reservoirs underlying both the Butler A and Butler B leases, with no loss to United of entitlement volumes (as in the footnote to the preceding paragraph). In that case, there would be no net withdrawal of reserves from interstate commerce requiring Section 7(b) abandonment authorization on that basis. *The Tarpon Oil Corporation, et al.*, Docket Nos. CI60-582, *et al.*, 26 FPC 635, 639 (1961). Even if such authorization should be required, we could rationalize that since the same strata of the same acreage cannot be embraced within a unit, and not embraced within a unit, at the same time, and since the certificate in Docket No. G-12694 covers both situations, it is reasonable to assume that limited pre-granted abandonment authorization is implicit in that certificate to enable the formation and dissolution of units. And the limit would be the dividing point at which there are no net withdrawals of reserves from interstate commerce.

8. But where the formation and dissolution of natural gas producing units brings about a net withdrawal of dedicated reserves from interstate commerce, then Section 7(b) abandonment authorization is required.[5] An exact percentage matching of leasehold boundaries with reservoir boundaries (as in the footnote to the second preceding paragraph) would rarely, if ever, occur. When leaseholds which are dedicated to interstate commerce are unitized with leaseholds which are not so dedicated, the underlying dedicated reserves will thereby be withdrawn from interstate

[5] Where, for example, a given reservoir underlies some, but not all, of the leaseholds within a unit, there would seem to be a net withdrawal of reserves from interstate commerce incident to its formation or dissolution, and not merely a realignment of entitlement percentages to reservoirs underlying all of the leaseholds within the unit, even if the withdrawn reserves are fully offset by the addition of other reserves incident to the formation or dissolution of the unit.

commerce to the extent that the areal percentage of those reserves within the unit exceeds the areal percentage of the dedicated leaseholds within the unit. Utilizing the Opinion No. 740-A example in which Whiteacre, which is dedicated, is one-third the size of Blackacre, which is not dedicated, and assuming that 40% of the reserves underlying both leaseholds underlie Whiteacre, then the formation of the Grayacre unit would cause Whiteacre's entitlement to decline from 100% of the (Whiteacre) production which, in turn would embrace 40% of the reservoirs, to 25% of the (combined Whiteacre and Blackacre) production which, in turn, would embrace 100% of the reservoirs. In other words, the formation of the Grayacre unit would effect a net withdrawal of 15% of the combined underlying reserves from interstate commerce. And by gerrymandering leasehold boundaries, the formation of natural gas producing units could be used as a vehicle for depriving interstate commerce of dedicated natural gas reserves.

9. But reservoir entitlements tell only one side of the story. The other side is production. In the example in the preceding paragraph, dissolution of the Grayacre unit would effect a net gain of 15% of the combined underlying reserves for interstate commerce. But if all of the current production, or a substantial part of the current production, is from Blackacre, the nondedicated leasehold, the dissolution of the Grayacre unit would result in drainage, or net drainage, of the reserves underlying Whiteacre, the dedicated leasehold. The dissolution of a natural gas producing unit under such circumstances could also be used as a vehicle for depriving interstate commerce of dedicated natural gas reserves.

10. Because both the formation and dissolution of natural gas producing units can be used as vehicles for withdrawing dedicated natural gas reserves from interstate commerce, we are now of the view that Section 7(b) abandonment authorization should be and is required whenever the formation or dissolution of such a unit would

result in a net withdrawal of such reserves from interstate commerce. And because of the interacting complexities of current production and underlying reserves, we would measure such a net withdrawal of reserves for the purpose of Section 7(b) in terms of current production, underlying reserves or any other rational standard. In other words, we want to take a look at the formation or dissolution of a natural gas producing unit if a net withdrawal of reserves from interstate commerce can be demonstrated in terms of current production, underlying reserves or any other rational standard.[6]

11. We will not complicate this proceeding by ordering the members of the McCombs Group to show cause why they should not be required to file an application under Section 7(b) of the Natural Gas Act before we recognize the attempted dissolution of McCombs-Butler Gas Unit Nos. 1 and 2 for the purpose of the Act. Suffice it to say that we are satisfied that so much of the record as is before us, particularly the testimony of witness Bill Forney, Jr., amply demonstrates that dedicated natural gas reserves would be withdrawn from interstate commerce, at least under the production standard discussed in the second preceding paragraph, and, as a result, the record makes a prima facie showing that such an application is a necessary prerequisite for our recognition of the attempted dissolution of those units for the purpose of the Natural Gas Act. While we did not err, as United contends, in failing to make a firmer ruling with respect to the reason(s) for the attempted dissolution of McCombs-Butler Gas Unit Nos. 1 and 2, we now decline to recognize the attempted dissolution of those units for the purpose of the

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[6] While it is the obligation of the person or entity forming or dissolving the unit to file a Section 7(b) abandonment application, there may be situations in which they may disclaim that there would be a net reduction of reserves under any standard. In such a case, we will ordinarily entertain a complaint to determine that fact.

Natural Gas Act for the additional reason, and until such time, as an abandonment application under Section 7(b) is filed and the statutory determinations permitting or denying abandonment are made.

12. As a second ground for rehearing, United urges that we should reject the McCombs Group's settlement proposal as being contrary to the public interest and, consequently, eliminate that proposal from consideration in Phase II of this proceeding. United's argument, in this connection, is largely repetitive of its position set out in several of its filings considered in connection with the various facets of Opinion No. 740-A in which we decided to permit the settlement proposal to be considered on its merits as an alternative to the disposition of this proceeding set out in Opinion No. 740 and modified in Opinion No. 740-A.[7] But United adds in its application for rehearing of Opinion No. 740-A:

> "[T]he McCombs Group has placed into the record every bit of information with respect to reserves that it intends to adduce. This was made clear at the prehearing conference held November 24, 1975, at which time counsel for the McCombs Group indicated that the McCombs Group would not present any additional reasons or evidence in support of the offer of settlement."

13. Again, United claims that we erred as a result of something which occurred after we decided and issued Opinion No. 740-A, which seems to us to be a legal impossibility. United appears to be asking us, in effect, to reach a different result on the basis of later information, which request seems to be in the nature of a motion which is neither supported by the later information[8] nor cast in

[7] *Michigan Consolidated Gas Company* v. *Federal Power Commission*, 238 F.2d 204, cert. den. 364 U.S. 913 (1960).

[8] The record of the prehearing conference held November 24, 1975, has not been brought to our official attention.

such a manner as to permit a fair opportunity to respond.[9] In any event, as previously indicated in Opinion No. 740-A, we continue to believe that we are proceeding properly under *Michigan Consolidated*, supra, to consider the settlement proposal on its merits, and we reject United's contention that we erred because the record which was before us when we decided Opinion No. 740-A was subsequently limited by the McCombs Group's decision, asserted by United, not to offer additional supporting evidence.

14. On December 23, 1975, the McCombs Group and du Pont filed a response to United's application urging that it be treated as a motion for reconsideration, that their response be treated as an answer to United's motion under § 1.12(c) of our Rules of Practice and Procedure and, finally, that United's motion be denied. Notwithstanding the course of action advocated by them, we are treating United's filing as an application for rehearing and, consequently, we are not considering the merits of the McCombs Group's and du Pont's response since it is not an authorized filing in the absence of our granting rehearing under § 1.34(d) of our Rules of Practice and Procedure. And while we reach the same result on the merits of United's application as is advocated by the McCombs Group and du Pont, we note that those respondents have apparently reached the point at which they have no substantial new arguments.

The Commission further finds:

The assignments of error and grounds for rehearing set forth in United Gas Pipe Line Company's application for

[9] While § 1.12(c) of our Rules of Practice and Procedure authorizes answers to motions, § 1.34(d) expressly prohibits answers to applications for rehearing. As a result, a request which is properly the subject of a motion and which is cast in the form of an application for rehearing could mislead a litigant with respect to his right to respond.

rehearing filed December 8, 1975, present no facts or legal principles which would warrant any change in or modification of Opinion No. 740-A and order issued November 7, 1975, except as that Opinion and order is clarified herein.

The Commission orders:

The application for rehearing of Opinion No. 740-A filed by United Gas Pipe Line Company on December 8, 1975, is denied.

By the Commission.

(SEAL)

Mary Kidd Peak,
Acting Secretary.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 75-1829

BILLY J. MCCOMBS, R. JAMES STILLINGS, d/b/a GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORPORATION, E.I. DU PONT DE NEMOURS & COMPANY, and BILL FORNEY,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent,

UNITED GAS PIPE LINE COMPANY,

Intervenor.

On Petition for Review of Orders of the Federal Power Commission

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(October 18, 1976)

Before HILL and SETH, Circuit Judges and TEMPLAR, Senior District Judge.*

SETH, Circuit Judge: This is a proceeding to review Opinions Nos. 740, 740-A, and 740-B of the Federal Power Commission entered in its docket No. CP74-94. The orders were stayed by this court on December 9, 1975.

The issues on this review concern two sections of the Natural Gas Act, Sections 7(b) and 7(c) [15 U.S.C. §§ 717f (f) and 717f(c)]. The Commission found that the petitioners had violated the Act by failing to deliver gas to United Gas Pipe Line Company. The petitioners' contention that there was an abandonment under Section 7(b) was thus found to be without merit by the Commission.

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* Of the District of Kansas, Sitting by Designation.

The factual background must be described at some length. In May 1948, B. C. Butler, Sr. et al. executed an oil and gas lease to W. R. Quin (the Butler B lease) covering approximately 163 acres (the Butler B tract) in Karnes County, Texas.

Under a Gas Purchase Contract dated April 29, 1953 (the 1953 Gas Purchase Contract), the leaseholders agreed to sell and deliver to United Gas Pipe Line Company "merchantable natural gas . . . produced from all wells now or hereafter drilled" on the Butler B tract plus "seller's proportionate part of all merchantable natural gas produced from any well or wells located on any unit or units" which include any portion of the Butler B tract.

Following the *Phillips* decision, Quin filed application with the Federal Power Commission for producer certificates. On December 8, 1954, the Commission issued certificates to Quin authorizing the sale, and continued sale, of the natural gas in interstate commerce. The lease was transferred several times.

The Butler B lease was eventutlly assigned to H. A. Pagenkopf. On June 19, 1963, the Commission ordered termination of the 1954 certificates and issued a new certificate in Docket No. G-12694 authorizing Pagenkopf to continue the service which had been initiated by Quin.

In 1966, Pagenkopf assigned the lease to L. H. Haring, Jr., who, in turn, engaged Bay Rock Corporation as operator. Haring notified United of the assignment, stating that he would make appropriate filings with the Commission reflecting the change in ownership. He never made such filings. At the time of the Pagenkopf-Haring assignment, there was one well on the Butler B tract, the Butler No. 7 Gas Well, which was completed at approximately 2,900 feet, but was not then producing. Haring unsuccessfully attempted to establish production from the well, but all production ceased on May 28, 1966. On December 5, 1966, Haring and Bay Rock notified United that the well was depleted and no more gas was available "at this time."

United acknowledged the depletion and removed its equipment but advised that it would reinstall its equipment whenever Bay Rock might have further gas to deliver under the contract. Bay Rock did not seek or obtain Commission authorization to abandon its sale to United.

Nothing further occurred with the Butler B tract until 1971 when Haring transferred his working interest rights in certain deep reservoirs in the acreage to National Exploration Company and the McCombs Group. On November 1, 1971, Haring assigned a working interest in the west 50 acres of the 163-acre Butler B tract from a depth of 4,115 feet to 8,700 feet to National Exploration pursuant to a prior agreement under which the 50-acre interest was unitized by National Exploration with its interest in 302 adjoining acres. National Exploration was unaware at the time of the assignment of United's interest in the Butler B tract. On October 22, 1971, the McCombs Group acquired a working interest in the remaining 113 acres of the Butler B tract between 6,500 feet and 8,653 feet. On November 1, 1971, the McCombs Group designated as the McCombs-Butler Gas Unit No. 1 their interests embracing the east 113 acres of the Butler B tract and the adjoining 150 acres of the Butler A tract at the levels noted. On April 1, 1972, the McCombs Group acquired from Haring a working interest in the entire 163-acre Butler B tract between the depths of 8,700 feet and 9,700 feet. On April 3, 1972, the Group designated as the McCombs-Butler Gas Unit No. 2 their interests embracing the 163-acre Butler B tract and the adjoining 150-acre Butler A tract at the levels noted.

The McCombs Group thereupon began drilling. Relying on a 1967 title opinion which failed to show United's possible interest in the Butler B lease, the Group in September 1971 drilled Butler No. 1 Well in the Butler A tract which produced gas from the McCombs-Butler Gas Unit No. 1. McCombs then contacted United, among others, to negotiate a sale of the gas. By letter dated November 19, 1971,

United inquired into the source of the Group's leases. While the record evidence is in conflict as to the details of these negotiations, they were ultimately discontinued. As noted above, the McCombs-Butler Gas Unit No. 1 was designated effective November 1, 1971, and a new title opinion dated December 7, 1971, disclosed United's interest in the Butler B lease.

In February 1972, the Group drilled the Butler No. 2 Well on the Butler A tract which produced gas at depths embraced by the McCombs-Butler Gas Units Nos. 1 and 2. Gas Unit No. 2 was designated on April 3, 1972, but a title opinion dated May 31, 1972, failed to disclose United's possible interest in the Butler B tract.

The McCombs Group had been continuing negotiations for sale of the production and in June 1972 E. I. du Pont de Nemours & Company agreed to purchase all of the gas underlying the Butler A and B tracts for industrial consumption in the intrastate market.

The Group continued drilling operations. In September 1972, the Butler No. 3 Well on the Butler B tract began producing gas at depths embraced by the McCombs-Butler Gas Unit No. 1. At the same time, the Butler Well No. 4 on the Butler A tract produced gas at levels embraced by the McCombs-Butler Gas Units Nos. 1 and 2.

In the meantime, early in 1972, National Exploration drilled two gas producing wells within its allocated depths on the west 50 acres of the Butler B tract. United sought to purchase the gas in April 1972. In the course of preparing the sale, National Exploration notified United that they believed the company's working interest in the 50 acres of the Butler B tract might be subject to United's 1953 Gas Purchase Contract. United thereupon undertook a title search relative to the Butler B tract and in late May 1973, learned of its interest. On June 6, 1973, United notified the McCombs Group of its claim under the 1953 contract.

The Group responded by filing a lawsuit in the District Court of Karnes County, Texas, seeking a declaratory judgment that the Quin-United contract did not entitle United to Butler B gas. The proceeding was removed to the United States District Court for the Western District of Texas where it is being held pending the outcome of these proceedings.

By subsequent agreement, National Exploration agreed to sell its portion of Butler B gas to United and it is no longer a party to the proceedings.

On October 9, 1973, United filed a complaint with the Federal Power Commission alleging that the McCombs Group was violating the Natural Gas Act and requesting the Commission to issue an order requiring the Group to show cause why they were not in violation of the Act. United also asked the Commission to order the Group to deliver to United volumes equivalent to those which had been diverted from the interstate market to du Pont. McCombs filed its Answer and a Motion to Dismiss or Defer the Action, in which it denied violating the Act and moved to dismiss the petitions, or to defer the proceedings pending the outcome of the court litigation which challenged the validity of the Quin-United contract.

On November 27, 1973, the Commission issued a show cause order (JA at 89-92) requiring the Group to appear at hearings and to show cause why they should not be held in violation of Section 7 of the Natural Gas Act; why they should not be required to file applications for certificates of public convenience and necessity as successors in interest; why they should not be required to deliver to United in compliance with the contract provisions volumes equivalent to those withheld from the interstate market; and why they should not be required to cease and desist from the sales then being made in the intrastate market.

On December 12, 1973, the Commission denied McCombs' motions to dismiss or defer the proceedings (JA at 93-95),

noting that the validity of the Quin-United contract was irrelevant to the Commission's determination of obligations under the Natural Gas Act.

Hearings commenced before an administrative law judge on January 10, 1974, and ended on February 14, 1974. On April 26, 1974, the presiding judge issued his initial decision (JA at 103-117). The judge concluded that "the service authorized and the gas supply dedicated by the certificates involved herein [Pagenkopf's successor producer certificate, FPC Docket No. G-12694] include any and all gas produced from the Butler B acreage" and, consequently, the unauthorized intrastate sale of that gas violated the Natural Gas Act. Additionally, he concluded that however negligent United may have been in asserting its rights, and however innocent McCombs may have been, the Group should be required to cease and desist from continuing the sales and to file applications under Section 7 for authority to make new sales. Finally, the judge held that the record was inadequate for determining the volumes attributable to the Butler B lease which were diverted and reserved all questions of appropriate remedy until McCombs filed applications for new certificates. Exceptions to the decision were filed by both parties.

On August 20, 1975, the Commission issued Opinion 740 (JA at 129-171), affirming the initial decision of the administrative law judge. The Commission held that Sections 7(b) and 7(c) of the Natural Gas Act, considered together, required the continuation of certificated service. Relying on that principle, it concluded that the certificate issued to Pagenkopf required the McCombs Group to sell Butler B gas to United.

On September 10, 1975, the McCombs Group filed an Application for Rehearing and a Motion to Stay (JA at 173-189). In response to the issues raised in the application for rehearing, the Commission issued Opinion 740-A on November 7, 1975 (JA at 232-250), which dealt with a settlement

proposal not here considered, and directed that evidence be taken as to it. On January 19, 1976, the Commission issued Opinion 740-B (JA at 252-261), which denied United's application for rehearing of Opinion 740-A. The Commission affirmed its earlier decision on the points raised preferring fuller development of the record. It also treated several other issues not here concerned. All three Opinions, 740, 740-A, and 740-B, are currently stayed by order of this court issued December 9, 1975. Evidentiary hearings before the administrative law judge continue in accordance with the Opinions.

Appellant McCombs raises several points on appeal, the most important of which is a challenge to the Commission's holding that abandonment authorization and recertification was necessary for sales of gas by McCombs in the Butler B tract.

Of these several issues raised on this appeal, we will only consider what appears to be the basic one, and that is the matter of abandonment.

To consider again some of the facts outlined above as they relate to this issue, the one producing gas well on the Butler B lease ceased producing early in 1966. The lease was assigned by Pagenkopf effective in March 1966, and the assignee, Haring, attempted to work over the well. During this work, about 3,000 Mcf was produced, but all production again ended in May 1966. The operator for Haring advised the gas purchaser, United, in December 1966 that the well was depleted. United thereafter in 1966 removed the equipment it had connected to the well. Thus, the only producing gas well was abandoned in the fall of 1966. The operator and the purchaser recognized that there could be no more gas delivered from the well. This was a physical fact beyond the control of either of them, and they recognized the realities of the situation. The operator or owner had tried to restore production but was unable to do so. The sellers and buyers wished to continue

the sale and purchase of gas but could not do so. The record does not show that any gas was ever produced thereafter from this original well. The witness Haring who was the owner who attempted the workover, and who was a petroleum geologist, testified:

> "Certainly I was not aware of the gas reserves at deeper levels when the gas production ceased in 1966, and, as far as I know, neither United nor anyone else was aware of its existence."

In August 1968, the FPC wrote a letter to Pagenkopf suggesting that he file an application for abandonment. By an undated letter the Commission made a similar suggestion to the operator for Pagenkopf's successor, Haring. The FPC thus twice recognized that there had been no production for an extended time, and recognized that the abandonment should be formalized for its records. This must be acknowledged as a recognition by the Commission that there was in fact an abandonment, but there was something needed for the record. The records of the FPC as to this matter have apparently been destroyed under its procedures; consequently, it is not known what they may have indicated as to abandonment. The Commission in Opinion No. 740 in footnote 2 states as to the original proceedings for certification: "Our records indicate that Docket Nos. G-2997 and G-2998 were destroyed in 1964." It is apparent however from the testimony that no operator or owner filed a formal application to abandon.

Thus we have a situation where there was an abandonment as a recognition of the indisputable physical facts beyond anyone's control. The Commission participated in this recognition as there were at least two suggestions by the Commission that someone file something to tidy up the records. These letters from the Commission must be taken, in view of the destruction of the supporting records, to be an acknowledgment that there was an abandonment. It is difficult to see how a formal application, and a decision by the Commission could have added anything to these letters. In these circumstances, we must hold that there was an abandonment which was recognized by the Commission, and its jurisdiction ended.

Thus we must hold as a matter of law that there was an abandonment sufficient under Section 7(b) of the Natural Gas Act. This being a matter of law, we do not consider it within the expertise of the Commission.

The "abandonment" we refer to is that contemplated under Section 7(b) of the Act, as above indicated. This is the only "abandonment" which is applicable to these circumstances. Section 7(b) refers to "service rendered," and the ordering of further "service" would have been a futile gesture. The seeking of an application by the Commission was a recognition of the fact that no more gas could be delivered from the only gas well, and that the "service rendered" had long since ceased contrary to everyone's wishes. This action by the Commission thus could only have reference to Section 7(b).

We have examined the relationship between service and certification insofar as the Court did in *Sun Oil Co. v. Federal Power Comm'n*, 364 U.S. 170, 80 S.Ct. 1388, 4 L.Ed.2d 1639; *Sunray Mid-Continent Oil Co. v. Federal Power Comm'n*, 364 U.S. 137, 80 S.Ct. 1392, 4 L.Ed.2d 1623; *United Gas Pipe Line Co. v. Federal Power Comm'n*, 385 U.S. 83, 87 S.Ct. 265, 17 L.Ed.2d 181, and in *Atlantic Refining Co. v. Public Service Comm'n*, 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed.2d 1312, and find no guidance as to the basic issue here presented. It is obvious from these decisions and from the Natural Gas Act that the Commission can and must prevent the termination of interstate service being rendered. This is no more than basic public utility doctrine, but when there is no service, and has been none for the several years here concerned by reason of depletion, there is no place for the application of the doctrine. The "service" is not the lease. *See Federal Power*

Comm'n v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 69 S.Ct. 1251, 93 L.Ed. 1499, and *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 85 S.Ct. 1517, 14 L.Ed.2d 466.

We stated in *Harper Oil Co. v. Federal Power Comm'n*, 284 F.2d 137 (10th Cir.), that:

> "It would thus seem clear that when once an independent producer of gas has dedicated his production to interstate commerce and thereby has come under the jurisdiction of the Commission, he remains thereunder so long as production continues. (Citing *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333)."

The determination of the abandonment issue is thus related to service and to production and not to leases. Again it would seem sufficient to rely upon the physical facts plus the recognition by the Commission of the realities of the situation.

It is also important to consider the statement of the Commission in Opinion No. 740 where it said:

> "And they are undoubtedly correct in their assertion that the purpose of Section 7(b) is to require the continuance of service once it has been commenced and the public has relied on it, and further, that Section 7(b) could not as a practicable matter have served that purpose when natural gas service from the Butler B tract was discontinued in 1966 . . ."

The Commission in this case has thus construed Section 7(b) abandonment to be in order when the only well delivering gas from the only known horizon has ceased to produce for an extended period by reason of depletion, and workover attempts have failed to restore production. The abandonment was thus a fact and the solicitation of

the producer to formalize it for the records is a sufficient indication that it was abandoned under Section 7(b).

All orders included in Opinions Nos. 740, 740-A, and 740-B are set aside, and the case is remanded with directions that other pending proceedings in FPC Docket No. CP74-94 based on such orders be terminated and the proceedings be dismissed.

IT IS SO ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

(Caption Omitted in Printing)

Order

MARCH TERM—MAY 2, 1977

Before LEWIS, Chief Judge, HILL, Senior Circuit Judge, and SETH, HOLLOWAY, MCWILLIAMS, BARRETT, and DOYLE, Circuit Judges.

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc presented by the respondent, Federal Power Commission, and intervenor, United Gas Pipe Line Company.

Upon consideration whereof, it is ordered that a rehearing in the captioned case is granted. The Court will advise the parties whether further briefing or oral argument is required at a later date.

The suggestion for rehearing en banc having been presented to the Court and no member of the panel nor judge in regular active service on the Court having requested that a vote be taken on the suggestion en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ HOWARD K. PHILLIPS
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

(Caption Omitted in Printing)

Order

SEPTEMBER TERM—OCTOBER 18, 1977

Before SETH and HILL, Circuit Judges, and TEMPLAR, Senior District Judge.

This matter comes on for further consideration of the order granting rehearing in the captioned appeal.

Upon consideration whereof, it is ordered:

1. The opinion filed October 18, 1976, is withdrawn.
2. The judgment entered October 18, 1976, is vacated.

/s/ HOWARD K. PHILLIPS
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 75-1829

BILLY J. MCCOMBS, R. JAMES STILLINGS, d/b/a GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORPORATION, E. I. DU PONT DE NEMOURS & COMPANY, and BILL FORNEY,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, formerly known as FEDERAL POWER COMMISSION,

Respondent,

UNITED GAS PIPE LINE COMPANY,

Intervenor.

JANUARY TERM—FEBRUARY 9, 1978

Before SETH, HOLLOWAY and BARRETT, Circuit Judges.

Judgment

This cause came on to be heard on the record on appeal from the FERC and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of the FERC is reversed. The cause is remanded with directions that all orders included in the Commission's Opinions Nos. 740, 740-A, and 740-B be set aside. Further directions are issued that other pending proceedings in the Commission's Docket No. CP74-94 based on such orders be terminated and that the proceedings be dismissed.

William J. Holloway, Jr., Circuit Judge, dissented.

/s/ HOWARD K. PHILLIPS
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

(Caption Omitted in Printing)

Order

MARCH TERM—APRIL 6, 1978

Before SETH, HOLLOWAY, MCWILLIAMS, BARRETT, DOYLE, MCKAY, and LOGAN, Circuit Judges.

The Court, in order to correct a clerical error in the order entered April 4, 1978, in the captioned cause, hereby orders that the order of April 4, 1978, is vacated.

The order is reissued as of April 4, 1978, to read as follows:

This matter comes on for consideration of the respective petitions of Federal Energy Regulatory Commission and United Gas Pipe Line Company for rehearing and suggestions for rehearing en banc, and for consideration of United Gas Pipe Line Company's alternative request that the mandate be modified so that the Federal Energy Regulatory Commission may consider settlement agreements between United and persons who are not parties to the instant appeal.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judge Seth and Circuit Judge Barrett to whom the case was argued and submitted. Circuit Judge Holloway, also on the hearing panel and who dissented in the opinion filed February 9, 1978, voted to grant rehearing.

The rehearing having been denied by the hearing panel and no judge of the Court in regular active service on [*sic*] judge who was a member of the panel rendering the decision having requested a vote on such suggestion for

rehearing en banc, the suggestion for rehearing en banc is denied.

It is further ordered that United's alternative request that the mandate be modified so that the Federal Energy Regulatory Commission may consider settlement agreements between United and persons who are not parties to the instant appeal is also denied.

/s/ HOWARD K. PHILLIPS
Clerk

FPC Form 357
Rev (6-66)

ADDRESS ALL COMMUNICATIONS
TO THE SECRETARY

FEDERAL POWER COMMISSION
WASHINGTON, D. C. 20426

August 8, 1968

In reply refer to:
BNG-IP/GC
Docket No. G-12694
H.A. Pagenkopf
(Operator), *et al.*

H. A. Pagenkopf
1631 Milam Building
San Antonio, Texas 78205

Dear Mr. Pagenkopf:

Your annual report on FPC Form 301-A indicates no sales of natural gas were made during 1967 under your rate schedule(s) listed below.

If no further sales are contemplated under the subject rate schedule(s), it will be necessary for you to file an abandonment application and a notice of cancellation of rate schedule. To do this, you may complete and submit for each sale involved an original and three copies, under oath, of the enclosed FPC Form 277 (see Sections 157.30 (b) and 250.7 of the Commission's Regulations) and three copies of the enclosed FPC Form 281 (see Sections 154.97 (a) and 250.9 of the Commission's Regulations). A copy of excerpts from the Commission's Rules and Regulations, containing the sections referred to, is also enclosed for your information and guidance. Your filing should include three copies of any agreement entered into with the buyer to cancel the contract or if the contract has not been formally cancelled, three copies of a statement from the buyer indicating its position with respect to the proposed abandonment.

The above filings will not be required if you have assigned your interest in these properties to another party; however, in that event, it is requested that you furnish us with the name and address of the new owner and the date the assignment was made.

A prompt reply is requested.

Very truly yours,
/s/ Kenneth F. Plumb
Acting Secretary

FPC Gas Rate Schedule	Certificate Docket No.	Contract Date	Buyer
1	G-12694	4-29-53	United Gas Pipe Line Company

Enclosure No. 1383

BNG
Rand, M. L. :fjs/8-6-68

FEDERAL POWER COMMISSION
WASHINGTON 20426

BNG-IP/GC
Docket Nos. G-12692 and G-12694
H. A. Pagenkopf (Operator), et al.

Dec. 2, 1970

H. A. Pagenkopf, Trustee
1631 Milam Building
San Antonio, Texas 78205

Dear Mr. Pagenkopf:

Your annual report for 1969 on FPC Form 301-A indicates that the properties dedicated to a contract dated April 29, 1953 between Bee Quin and United Gas Pipe Line Company, presently designated as H. A. Pagenkopf (Operator), et al., FPC Gas Rate Schedule No. 1, have been sold. It is requested that you furnish the Commission with the name and address of the new owner and the date of the transfer of properties.

A prompt reply is requested.

Very truly yours,

Secretary

cc: United Gas Pipe Line Company
P. O. Box 1407
Shreveport, Louisiana 71102

FEDERAL POWER COMMISSION
WASHINGTON 20426

BNG-IP/GC
Docket No. G-12694
H. A. Pagenkopf
(Operator), et al.

January 13, 1971

Bay Rock Corporation
D-310 Petroleum Center
San Antonio, Texas 78209

Gentlemen:

This is with reference to the Commission's letter dated July 7, 1966, which requested that you file an application for a certificate of public convenience and necessity to continue the sale presently authorized in the captioned docket from properties covered by H.A. Pagenkopf (Operator), et al., FPC Gas Rate Schedule No. 1. These properties were sold to Louis Haring, et al., effective March 1, 1966. A copy of the letter is enclosed.

It is noted that you have not filed to continue the sale. If no sale is contemplated, it will be necessary for you to file an original and three copies of an application to abandon the service authorized in Docket No. G-12694. In order to accomplish this you may complete and submit an original and three copies of the enclosed FPC Form No. 277. It will also be necessary to submit three copies of a notice of cancellation of H. A. Pagenkopf (Operator), et al., FPC Gas Rate Schedule No. 1 by completing the enclosed FPC Form No. 281. Your submittal should also include three copies of: (1) the instrument whereby the properties were transferred from H. A. Pagenkopf to Louis Haring, et al.; (2) any agreement entered into with the buyer to cancel the contract or if the contract has not been cancelled, three copies of a statement from the buyer indicating its position with respect to the proposed abandonment.

A copy of excerpts from the Commission's Rules and Regulations is also enclosed to assist you in your filing.

A prompt reply is requested.

Very truly yours,

Enclosure No. 55400

Secretary

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-17

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

BILLY J. McCOMBS, *ET AL.*, RESPONDENTS

No. 78-249

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

BILLY J. McCOMBS, *ET AL.*, RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED JULY 3 AND AUGUST 14, 1978
CERTIORARI GRANTED OCTOBER 10, 1978

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78–17

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

BILLY J. MCCOMBS, *ET AL.*, RESPONDENTS

No. 78–249

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

BILLY J. MCCOMBS, *ET AL.*, RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TABLE OF CONTENTS

*A number of the items appropriate for inclusion in the Appendix in this case have already been printed and submitted to the Court in the Appendix to Petition for Certiorari in No. 78–17, United Gas Pipe Line Co. v. Billy J. McCombs, *et al.* An asterisk following the page numbers under the column "Appendix pagination" in this Table of Contents denotes that the item appears at the pages designated in the Appendix to Petition for Certiorari.

TABLE OF CONTENTS—Continued

*Asterisk denotes that item appears at page numbers designated in Appendix to Petition for Certiorari in No. 78–17, United Gas Pipe Line Co. v. Billy J. McCombs, *et al.*

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United States Court of Appeals for the Tenth Circuit

No. 75–1829

BILLY J. McCOMBS, R. JAMES STILLINGS, D/B/A GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORPORATION, E. I. DU PONT DE NEMOURS & COMPANY AND BILL FORNEY, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, FORMERLY KNOWN AS FEDERAL POWER COMMISSION, RESPONDENT

UNITED GAS PIPE LINE COMPANY, INTERVENOR

RELEVANT DOCKET ENTRIES

Order staying effect of ordering paragraph (A) of FPC Opinion No. 740 as modified by FPC Opinion No. 740–A, granting intervention and establishing briefing schedule	December 9, 1975
Initial opinion	October 18, 1976
Order granting rehearing	May 2, 1977
Order vacating prior opinion and withdrawing judgment	October 18, 1977
Opinion on rehearing	February 9, 1978
Judgment on rehearing	February 9, 1978
Order denying rehearing	April 6, 1978, as of April 4, 1978

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. CP74–94

UNITED GAS PIPE LINE COMPANY, COMPLAINANT,

v.

BILLY J. MCCOMBS, R. JAMES STILLINGS, D/B/A GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORPORATION, LOUIS H. HARING, JR., NATIONAL EXPLORATION COMPANY, E. I. DU PONT DE NEMOURS & COMPANY AND BILL FORNEY, RESPONDENTS.

Initial Decision on Section 7 Show Cause Order

(Issued April 26, 1974)

INTRODUCTION

LEVY, Presiding Administrative Law Judge: On October 9, 1973, United Gas Pipe Line Company (United) filed a complaint with the Federal Power Commission (Commission) alleging that the Respondents, Billy J. McCombs, R. James Stillings, d/b/a Gastill Company, David A. Onsguard, Bill Forney,[1]

[1] Bill Forney was joined as a party Respondent by Commission order issued March 5, 1974. He is operator for, and a member of, the McCombs Group.

Basin Petroleum Corporation (McCombs Group), Louis H. Haring, Jr. (Haring), National Exploration Company (NEC) and E. I. du Pont d'Neumours and Company (duPont) had failed to comply with the requirements of Section 7 of the Natural Gas Act and refused to comply with the terms of a certificate of public convenience and necessity issued in FPC Docket No. G–12694, authorizing the sale of natural gas from certain lands and leaseholds in Goliad and Karnes Counties, Texas. United alleged that it has the right to purchase natural gas produced from wells drilled on this acreage in accordance with the above certificate and pursuant to a contract dated April 29, 1953, as amended February 7, 1961, and that defendants were violating the Natural Gas Act by selling such gas to others and refusing to sell the gas to United. United also alleged that it is presently curtailing nearly 430 million Mcf of natural gas annually, or more than twenty-seven percent of its firm requirements and is suffering irreparable injury as a result of defendants' refusal to sell United the gas in question. Accordingly, United requested the Commission to issue an order requiring the defendants to show cause why they are not in compliance with the Natural Gas Act, to cease and desist the alleged unlawful deliveries, to deliver all gas produced from the subject acreage in the future and to deliver to United volumes equivalent to those allegedly unlawfully withheld from the interstate market.

The Commission issued a Notice of Complaint on October 18, 1973, inviting any party desiring to be heard in the proceedings to file a petition to intervene or protest with the FPC by November 12, 1973.

Prior to the commencement of this proceeding before the Commission, Billy J. McCombs, *et al.*, brought suit as plaintiffs in the District Court of Karnes County, Texas against United for a declaratory judgment that the United contract is void and unenforceable and to quiet their title against the claims of United, and for money damages. United removed the action to the U.S. District Court for the Western District of Texas, and has answered the McCombs Group complaint in that court. The McCombs Group alleged that the lease in question is free and clear of the claims made by United in its complaint to the Commission and that the McCombs Group entered into a contract with duPont to sell gas from the subject acreage free and clear of any rights of United under the United contract.

On November 27, 1973, the Commission issued a show cause order setting the matter for public hearing to commence January 10, 1974. The Respondents in the proceedings before the Commission were ordered to show cause why they should not be held in violation of Section 7 of the Natural Gas Act; why they should not be required to file applications for certificates of public convenience and necessity as successors in interest; why they should not be required to deliver to United in compliance with the contract provisions volumes equivalent to those withheld from the interstate market; and why they should not be required to cease the sale currently being made to the intrastate market.

The Commission's November 27, 1973, show cause order was issued prior to Respondents' answers to the October 9, 1973, complaint filed by United. In their responses, McCombs, Haring, and NEC moved

the Commission to dismiss or defer action on United's complaint pending resolution of the Texas lawsuit filed by McCombs. By order issued December 12, 1973, the Commission refused to dismiss or defer action because of the Texas lawsuit noting:

> "From an early date, this Commission has taken the view that there is a continuing obligation to perform 'service' imposed by the Act separate and apart from any contractual requirements. This distinction between the concept of underlying 'service' to the public and the contractual means by which it is implemented is quite important to a proper understanding of primary jurisdiction. Under Section 7(b), the finding that the 'public convenience and necessity' does not permit abandonment is alone sufficient to require a continuation of service, the private contract notwithstanding. Resolution of the private contract disagreement cannot, by any means be said to be dispositive of the paramount issues of the public interest under Section 7. In fact, it is these same public interest considerations that make it incumbent upon this Commission to exercise its primary jurisdiction, as delegated to it by the Act, in order to secure an initial administrative judgment of whether or not service should continue pursuant to a certificate of public convenience and necessity, as issued and outstanding." (Footnotes omitted).

Hearings were held on January 10, February 13 and 14, 1974, and briefing concluded on April 4, 1974. By order issued March 13, 1974, the Commission provided for an expedited initial decision on or before May 7, 1974, and limited the time for filing exceptions.

THE FACTUAL BACKGROUND

On April 29, 1953, United entered into a Gas Purchase Contract with Mrs. Bee Quin, Individually and as Independent Executrix of the Estate of W. R. Quin, for the sale and purchase of gas produced from certain acreage in Goliad and Karnes Counties, Texas. Article I of this contract provided that United, as Buyer, was entitled to purchase "merchantable natural gas in the quantities hereinafter set forth, produced from all wells now or hereafter drilled during the term of this contract on the lands and leaseholds" covered thereby. The original term of the contract was for ten years from the date of first deliveries. By amendment dated February 7, 1961 (Exh. 1, p. 78), the term of the contract was extended until 1981. Article I further provided that United would be entitled to receive its "proportionate share of all merchantable natural gas produced from any well or wells located on any unit or units which include any part of said lands and leaseholds" covered by the contract. Included in the dedication under the 1953 contract is a lease covering 163 acres in Karnes County, Texas, dated May 20, 1948, executed by B. C. Butler, Sr., *et al.*, as Lessor, to and in favor of W. R. Quin, as Lessee, which is known as the Butler B lease (Exh. 1, p. 23).

Following the *Phillips* decision (*Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672 (1954)), Mrs. Quin applied to the Commission for certificates of public convenience and necessity authorizing and requiring the sale and delivery to United of the natural gas covered by the 1953 contract. By orders issued December 8, 1954, and December 14, 1954, in Docket Nos.

G–2997 and G–2998, the Commission issued Mrs. Quin the requested certificates.

United installed a gathering facility and an above-ground field measuring station on the Butler B lease and received natural gas for its interstate pipeline system pursuant to the certificates issued to Mrs. Quin. United continued to receive natural gas from this acreage until some time in 1966. During this period, Mrs. Quin transferred her interest in the 1953 contract to San Andres Production Company, *et al.*, which, by order dated June 19, 1963, received a successor certificate from the Commission through its operator, H. A. Pagenkopf, Trustee, officially terminating the certificates issued in Docket Nos. G–2997 and G–2998, and authorizing and requiring, in Docket No. G–12694, that H. A. Pagenkopf, Trustee, continue the service to United initiated by Mrs. Quin.

By assignment dated April 5, 1966, and effective March 1, 1966, Haring acquired the rights granted under the Butler B lease from H. A. Pagenkopf and San Andres Production Company. By letter dated May 9, 1966, Haring informed United that he would make the appropriate filings with the Commission reflecting the change in ownership (Ex. 2). No filings were made to effect this succession in interest.

In response to a letter by United (Exh. 29), the operator for Haring, Bay Rock Corporation, wrote that the existing gas wells were depleted and that no other gas would be available at that time (Exh. 3). By letter dated December 7, 1966, United informed Bay Rock that United intended to remove its measuring facilities so that they might be used elsewhere on United's system. United stated, however, that measuring equipment would be reinstalled "if, at some future date, you have further gas to deliver to us at

the above delivery point, which will be subject to the terms of the above-captioned contract" (Exh. 4). Haring did not secure Commission permission to abandon the certificate authorizing and requiring the sale of gas from the Butler B lease to United.

In 1971 and 1972, Haring transferred his working interest rights in certain deep reservoirs in the acreage to NEC and McCombs. Under assignments from Haring, the McCombs Group acquired the working interest in 113[1] acres of the 163 acre Butler B tract as between the interval from 6,500 feet to 8,653 feet, and between 8,640 feet and 8,700 feet, and in the entire 163 acres between 8,700 and 9,700 feet all measured from the surface ground. These working interests have been unitized with the McCombs Group interest in the adjacent Butler A tract. Unit 1 comprises 263 acres of which the Butler B acreage represents 42.97%. Unit 2 comprises 313 acres of which the Butler B acreage represents 52.08%.

Upon completion of its original well in 1971, the McCombs Group contacted representatives of United in an effort to market the gas. United expressed interest and asked that information be supplied as to the manner in which the leases from which gas was to be purchased had been secured. While the record evidence is in conflict as to the details of these negotiations, they were ultimately discontinued. In June 1972, McCombs contracted with duPont to sell the gas from this acreage to the intrastate market for industrial consumption (Exh. 35).

In January 1973, United was notified by representatives of NEC that they believed the company's

[1] The remaining 50 acres were assigned to NEC under a November 1, 1971, agreement.

working interest in 50 acres of the Butler B tract might be subject to United's 1953 contract, as amended. NEC had acquired working interest rights to 50 acres of the Butler B tract between approximately 4,115 feet and 8,700 feet under an assignment dated November 1, 1971 (Exh. 9) without knowledge of United's possible interest. NEC estimated its original recoverable reserves attributable to the Butler B acreage at 3,989 MMcf. NEC also has substantial production in adjacent acreage within the McCaskill Field, 352 acres of which have been unitized with the Butler B 50 acres and from which it has sold gas. NEC entered into a contract for temporary emergency sales of gas to United from the McCaskill Field on May 14, 1973, (Exh. 13) pursuant to Order No. 418. A subsequent agreement, dated October 9, 1973, (Exh. 14) was negotiated providing for the purchase by United of gas from NEC under Order No. 491–B for a period of 180 days.

POSITION OF THE PARTIES

United and Staff take the position that the 1953 gas purchase contract dedicated the gas produced from or attributable to the Butler B lease to the interstate market through the term of the contract which, as amended in 1961, expires in 1981 (Exh. 1, p. 87). Once certificated, abandonment of such service was never authorized by the Commission. Consequently, Respondents are in violation of the Natural Gas Act by reason of their failure and refusal to deliver the gas to United and should be required to file applications and deliver such volumes now and for the remaining term of the contract, as amended, including repayment for volumes allegedly unlawfully diverted.

The Respondents reply that the Commission lacks jurisdiction, that the service initially certificated under the 1953 contract and dedicated to the interstate market was limited to the sale of gas from four producing oil wells that were depleted and abandoned, *de facto,* by 1966, that undiscovered reserves in the Butler B tract were not included and were not dedicated to interstate commerce or covered by the 1953 contract whose validity, in any event, is the subject of litigation in the Federal District Court for the Western District of Texas. Moreover, United has waived its rights by its failure to make any claim prior to 1973. And finally, the Commission has no power to order the delivery of volumes previously sold and should defer to a judicial determination of the rights and claims of the parties under the 1953 contract.

DISCUSSION

1. The McCombs Group brief asserts the Commission lacks jurisdiction to determine the contractual claims of the parties to the production involved, a question of state contract law, or to consider a complaint filed by United under Section 13 of the Act which refers to complaints by "any state, municipality, or State Commission". Section 13 does not provide the sole and exclusive method for filing complaints. The Commission, under its Section 16 rulemaking authority has provided in Section 1.6 of its Rules of Practice and Procedure that "Any person . . . may file a complaint". Moreover, the Commission may proceed *sua sponte* to discharge its statutory responsibilities under the Natural Gas Act.

This show cause order is not based on the Commission's jurisdiction to determine "the private contract disagreement" between the parties. The obliga-

tion to continue service under Section 7 of the Act exists separate and apart from any contractual obligation. Resolution of the rights of the parties *inter se* can be determined in the pending Texas law suit. The show cause order is bottomed on the Commission's primary jurisdiction under Section 14(a) of the Act to determine whether the service obligations imposed under Section 7 of the Act by the issuance of outstanding certificates of public convenience and necessity are being violated, and if so, what remedies are appropriate.

2. The central issue is the nature and extent of the service authorized, and the gas supply dedicated by the certificates involved herein and imposed by Section 7 of the Act. The McCombs Group brief maintains that the obligated service under outstandinig certificates is limited to "actual deliveries made in interstate commerce", that not "a single Mcf of gas produced from the Butler B Lease was ever delivered to United", and that, in any event the "service" imposed must be limited to the producing wells or the formation in which the wells drilled are found (Init. Br. p. 10). NEC agrees that the service authorized by the certificates issued herein was limited to service from four oil wells and did not include "any and all wells on the acreage identified in the contracts" (Rep. Br. p. 2).

Section 7(b) of the Act provides in substance that no service subject to Commission jurisdiction rendered by a natural gas company may be abandoned without Commission authorization. The "service" required under the Act upon certification is not limited to the service actually being performed by the producer but extends to the service proposed, including the supply of gas dedicated to interstate use, which the producer has undertaken to perform in applying for certification and which the Commission has relied upon in evaluating whether the proposed service and gas supply meet the public convenience and necessity requirements of the Act. The original applications in Docket Nos. G–2997 and G–2998 proposed service under the 1953 contract, as amended, attached thereto as Exhibit C, which covered the continuing sale to United of gas produced from the dedicated acreage including the Butler B lease. The service which Mrs. Quin agreed to perform was not restricted to any particular well or reservoir. The fact that production and sale were then limited to gas from producing oil wells does not limit the service dedication to such operating oil wells. That dedication covered the sale of all gas produced during the term of the 1953 contract, as amended, "in the acreage owned and controlled by Applicant in the South Porter Gas Field, in Karnes County, Texas . . ." including the Butler B tract. The service dedication of this acreage was continued in the successor application [1] originally filed by Hawn Brothers on

[1] That application states in part:

"Applicant and other co-owners who are specifically set out below, have acquired (subject to production payments) the interest formerly owned by Bee Quin in various oil and gas leases covering land situated in the South Porter Field of Karnes and Goliad Counties, Texas. The interest so acquired by Applicant and the other co-owners is subject to that certain Gas Sales Contract dated April 29, 1953, and amendments thereto dated August 12, 1954; August 31, 1954; and, September 7, 1954, under the terms of which gas is sold to United Gas Pipe Line Company. With respect to sales under the subject contract, Bee Quin was by order issued by the Commission on December 8, 1954, in Docket No. G–2998, granted a certificate of public convenience and necessity, pursuant to an application therefore filed by Bee Quin. The subject Gas Sales Contract was filed with the Commission by Bee Quin as her rate schedule and is designated Mrs. Bee Quin FPC Gas Rate Schedule No. 1 and supplements thereto."

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June 3, 1957, and issued to H. A. Pagenkopf on June 19, 1963, in Docket No. G–12694. In point of fact, gas deliveries from the certificated acreage to United continued up to 1966, and included gas from wells drilled subsequent to the issuance of the original certificates (Tr. 46, 206). New certificates for each new well were neither required nor sought (Exh. 2, Exh. 1, p. 60). As noted in *Cumberland Natural Gas Company,* 34 FPC 132, 136–137 (1965):

> "The principle is well established that dedication of reserves for sale in interstate commerce occurs at least as soon as deliveries commence, and that once such service is begun, the producer cannot terminate the service without Commission approval. *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378, 387–389 (1959); *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137, 156 (1960). It is thus plain that in this instance Miller assumed the continuing duty to deliver for sale in interstate commerce the gas from its 9,000 dedicated acres until it exhausted its reserves or received Commission permission to cease service.
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> * * * * *
>
> Moreover, Miller's interest in these 80.5 acres was effectively dedicated irrespective of the fact that at the time of dedication the gas reserves in such acreage may have been unproven, and were never connected to the Cumberland's facilities."

3. The facts show that the existing wells were depleted by the end of 1966 and United subsequently withdrew its measuring facilities. However, under Section 7(b) of the Act, a service once commenced and a gas supply once dedicated cannot be abandoned or withdrawn from jurisdictional service without Commission approval.[1] Respondents argue that the Commission should do now what should have been done in 1966, and authorize abandonment *nunc pro tunc.* There is no assurance that abandonment, if applied for in 1966, would have been granted or even unopposed. In any event, it is now clear that the deeper reserves underlying the Butler B tract were not depleted (there was no evidence either way in 1966). Those deeper reserves were also dedicated to interstate commerce under the original certificates. Consequently, it would not be in the public interest during the present emergency[2] to authorize abandonment with the resulting loss of this vital and critical gas supply now needed by jurisdictional customers whose current requirements are being curtailed.

CONCLUSION

I have concluded that the service authorized and the gas supply dedicated by the certificates involved herein include any and all gas produced from the Butler B acreage. Consequently, the continuing unauthorized intrastate sale of this gas supply constitutes a violation of the Natural Gas Act and Respondents, as successors-in-interest to the original certificate holders, are required to file applications for certificates of public convenience and necessity under Section 7 of the Act. (*Graridge Corp.,* 30 FPC 1156, 1162[3] (1963).

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[1] *Atlantic Refining Co.* v. *P.S.C.* (*Catco*), 360 U.S. 378, (1959).

[2] United has projected 1974–75 curtailments of 36 to 39% of customer requirements.

[3] "Each successor, by stepping into the shoes of his predecessor, takes the properties and sales subject to any benefits or infirmities inherent therein."

The rights of the parties *inter se* and the appropriate remedies at this juncture, however, are another kettle of fish or, more appropriately, a can of worms. The Commission's show cause order of December 12, 1973, (cited *supra*) agrees that Respondents' service obligations under the Act are "separate and apart from any contractual requirements" or "Resolution of the private contract disagreement". The rights of the parties *inter se* and whether Respondents are *contractually* bound to deliver gas to United can best be determined in the litigation now pending in the U.S. District Court for the Western District of Texas (cited *supra*). That is the appropriate forum to determine the validity of the 1953 contract as, amended, the various contractual defenses asserted by Respondents including laches, waiver, estoppel, discharge, novation, accord and satisfaction and alleged violations of the antitrust laws.

Clearly, in this proceeding Respondents, however innocent of intentional violations and however negligent United may have been in asserting its rights should be required to cease and desist from continuing current, illegal, intrastate sales of the Butler B acreage gas supply and to file forthwith for authority under Section 7 of the Act to make approved sales. United and Staff argue for delivery to United now of all the volumes attributable to the Butler B lease including repayment for volumes unlawfully diverted.

Unfortunately, the record in this proceeding is inadequate for the determination of such diverted volumes and for defining the terms and conditions, including price, of past, present, and future sales. This determination can best be made following Respondents' filing of applications for certificates of

public convenience and necessity, as ordered herein, covering their sales of Butler B tract gas as successors-in-interest and the making of an adequate record for this purpose, assuming the matter is not resolved in pending settlement negotiations.[1] For example, NEC maintains that United has, in fact, received or soon will receive the equivalent of all volumes attributable to NEC's share of the Butler B tract. Through January 1974, 3 Bcf were produced from the Butler B tract compared to total deliveries to United by NEC of 3.5 Bcf[2] (see p. 8 of NEC Init. Br.). United apparently disagrees and also rejects the 2.3 Bcf estimate offered by the McCombs Group. The difficulty of identifying aggregate production from the Butler B tract is further complicated by pooling and unitization with other acreage and the complex nature of the gathering systems (Exh. 17, 27, 36).

The record is clear that NEC has acted at all times in good faith and in apparent compliance with Section 7 of the Act.[3] United's claim to production from the Butler B tract was not known or asserted when NEC began drilling in 1972. In fact, United's possible interest was brought to its attention by NEC in January 1973 (Tr. 140, 141, 163, 190). What effect should the Commission give to volumes delivered by NEC[4] under outstanding certificates while United was sleeping on

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[1] See footnote 46 on page 17 of United's Reply Brief.

[2] NEC's estimate of recoverable reserves underlying its 50 acres of the Butler B tract is 3,989 MMcf (Rep. Br. p. 9).

[3] The history of NEC's efforts is set forth in its Initial Brief, p. 6, *et seq.*

[4] See Commission Opinion No. 678 and Tr. 102, 150, 168–171.

its rights? United and NEC entered into a series of purchase gas contracts beginning on April 21, 1972, (Exh. 11–14). The effect of these agreements and authorized deliveries will have to be considered in determining NEC's current delivery obligations, if any, to United.

Similarly, the remedies available in respect of the McCombs Group should await their successor-in-interest filing as required in this proceeding. Staff urges that Respondents repay to United the volumes of gas unlawfully diverted but does not suggest how such an order should be quantified or implemented on the record in this proceeding. The McCombs Group, like NEC, asserts it acted without notice of United's claims and in good faith, and disputes the Commission's power to order make-up deliveries from uncommitted reserves outside the Butler B acreage or to assert jurisdiction over du-Pont under the Natural Gas Act. Accordingly, all questions relating to the appropriate remedies will be reserved for resolution after Respondents have filed applications for new certificates covering sales from Butler B acreage as required herein.

MOTIONS

By motion dated April 2, 1974, the McCombs Group requested that I exclude from consideration copies of applications for public convenience and necessity in Docket Nos. G–2997 and G–2998, supplied by United as Appendices A and B to its reply brief. The motion is denied. These copies were supplied for the record after it became apparent that these applications were no longer available in the Commission's files. The McCombs Group does not challenge the accuracy or

authenticity of the copies, duplicate originals of which are contained in United's files, which were sent to all parties by letter dated March 19, 1974 (United's Response dated April 6, 1974). The copies are received in evidence as relevant and material. The McCombs Group has commented fully on this material in its briefs.

FINDINGS AND CONCLUSIONS

Upon consideration of the entire record in this proceeding, including the evidence and the briefs filed, the Presiding Judge finds and concludes, in addition to the findings and conclusions above stated, as follows:

(1) The certificate issued in Docket No. G–12694, and the service initially dedicated thereunder, requires the delivery and sale in interstate commerce of all gas produced from the Butler B lease.

(2) Respondents are violating Section 7 of the Natural Gas Act as implemented by the regulations issued thereunder in that they are and have been making unauthorized sales of such gas without the approval of the Commission.

ORDER

WHEREFORE, IT IS ORDERED, subject to review by the Commission on appeal, or upon its own motion, as provided in the Commission's Rules of Practice and Procedure, that Respondents be and are hereby ordered:

(1) To file, pursuant to Section 154.92(d) of the Commission's Regulations, as successors-in-interest to the dedicated acreage and the service previously au-

thorized in Docket No. G–12694, and for such other authorization as may be necessary to comply with Section 7 of the Act and the Commission's Regulations issued thereunder; and

(2) To cease and desist the sales currently being made to the intrastate market of gas produced from the Butler B lease.

WILLIAM C. LEVY,
Presiding Administrative Law Judge.

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 75–1829

BILLY J. McCOMBS, R. JAMES STILLINGS, d/b/a GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORP., E. I. DU PONT DE NEMOURS & COMPANY AND BILL FORNEY, PETITIONERS,

v.

FEDERAL POWER COMMISSION, RESPONDENT,
UNITED GAS PIPE LINE COMPANY, INTERVENOR.

November Term—December 9, 1975

Before BREITENSTEIN, McWILLIAMS and DOYLE, Circuit Judges.

ORDER

This matter comes on for consideration of the motion for stay filed by the McCombs Group and DuPont together with the motion of United Gas Pipe Line Company for leave to intervene in the captioned appeal. The Court has received and examined the responses by the Commission and industry groups.

Upon consideration whereof, it is the ORDER of the Court as follows:

1. The Court Orders a stay of the effect of ordering paragraph (A) of Opinion No. 740, as modified by Order No. 740–A and any modifications thereof pending appeal and until further Order of this Court; and

2. It is the further Order of the Court that United

Gas Pipe Line Company is granted leave to intervene in the captioned cause.

The Court wishes to expedite the early submission of this matter upon the issues and, therefore, specifies that the following record and briefing schedule shall be met:

1. The record on appeal shall be filed not later than the date required by the Rules; i.e., December 24, 1975.

2. The Petitioners shall file their briefs on or before January 14, 1976. The Respondents shall file their brief on or before February 4, 1976. Reply briefs, if any, shall be filed on or before February 14, 1976. There shall be no extensions of time granted except by express Order of the Court.

The case shall be calendared for hearing during the February Term of Court commencing February 23, 1976.

HOWARD K. PHILLIPS, *Clerk.*

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 75-1829

BILLY J. McCOMBS, R. JAMES STILLINGS, d/b/a GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORPORATION, E. I. DU PONT DE NEMOURS & COMPANY, and BILL FORNEY,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, formerly known as FEDERAL POWER COMMISSION,

Respondent,

UNITED GAS PIPE LINE COMPANY,

Intervenor.

Opinion on Rehearing on Petition for Review of Orders of the Federal Power Commission

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(February 9, 1978)

Before SETH, HOLLOWAY and BARRETT, Circuit Judges.

BARRETT, Circuit Judge: These proceedings come before us for rehearing involving a review of opinions rendered by the Federal Power Commission (FPC) finding that the petitioners (McCombs Group) had violated two sections of the Natural Gas Act, 15 U.S.C. §§ 717f(b) and 717f(f) by failing to deliver natural gas to United Gas Pipe Line Company (United) under a producer's certificate authorizing the sale and continued sale of gas in interstate commerce. The pivotal dispute is whether the certificate was in force and effect or whether it had been abandoned prior to these proceedings. The FPC found that there had been no aban-

donment. In *McCombs* v. *Federal Power Commission*, 542 F.2d 1144 (10th Cir. 1976), authored by Judge Seth, the orders of the Commission involved here were set aside. However, this court granted the Commission's petition for rehearing. Thereafter, on October 18, 1977, this court directed and ordered that the opinion and judgment of October 18, 1976, *supra*, be withdrawn and vacated. We will refer to and quote from the prior opinion which has been vacated and withdrawn, however, inasmuch as it is reported in 542 F.2d 1144, *supra*.

In 1953, the leaseholders-producers of the Butler B lease covering a 163 acre tract situate in Karnes County, Texas, entered into a Gas Purchase Contract with United whereby the producers agreed to sell to United all natural gas produced then or thereafter from the tract. The producers applied to the FPC for producer certificates which were granted on December 8, 1954, authorizing the sale of the natural gas in interstate commerce.

The Butler B lease was assigned on various occasions prior to June 19, 1963, when the FPC terminated the 1954 certificates and issued a new certificate authorizing one H. A. Pagenkopf, then the Butler B lease assignee, to continue the service. This operator assigned the Butler B lease to one Louis H. Haring (Haring), et al., effective March 1, 1966. Haring appointed Bay Rock Corporation (Bay Rock) to operate the properties. At that time one well only had been completed on Butler B at a depth of 2,900 feet. It was not then producing. Haring-Bay Rock attempted to re-establish production from this well but those efforts failed for the most part and all production from the well and the lease terminated on May 28, 1966.

On December 5, 1966, Haring and Bay Rock informed United that production had ceased, that the gas reserve was depleted from the well and that there was no gas available for sale at that time. No deliveries of gas had been made to United since September 16, 1966. Following the notification that gas from the well was depleted, United

wrote Bay Rock that it planned to remove its measuring station which had been used to measure gas delivered to it from the well on the Butler B lease but that if, at some future date, further gas should become available from the properties subject to the 1953 contract, United should be informed so that it could arrange to reinstall the measuring equipment. United then removed the measuring equipment. Haring testified that he then considered the 1953 contract terminated.

Haring thereafter assigned his working interest rights, as successor lessee, to certain sands or reservoirs between depths of 8,700 to 9,700 feet. By means of unitization, the McCombs Group (Group) acquired the right to drill into these deeper depths involving the Butler B lease and an adjoining tract known as the Butler A lease, consisting of some 150 acres. Thereafter, the Group drilled and completed four producing gas wells from the deeper depths. One other company, National Exploration Company (National) which had previously acquired the Haring working interests in the west 50 acres of the Butler B lease covering depths of 4,115 feet to 8,700 feet had completed two producing gas wells. United contacted National in April of 1972 relative to purchasing the gas from these two wells. National then first became aware, in examining title documents in anticipation of sale of the gas, of United's 1953 purchase contract. National informed United that the gas from its two wells may be subject to United's 1953 Gas Purchase Contract. It was then that United undertook a title search concerning the Butler B tract. In May, 1973, United learned of its interest under the 1953 contract.

Haring did not at any time inform the Group of United's 1953 Gas Purchase Contract. He considered that contract terminated when production ceased from the single producing well on May 26, 1966. When he transferred his working interest rights to the deeper horizons in the Butler B lease to the Group, Haring did not believe that United had any further right or claim to gas which may be there-

after produced from the lease. The Group, before drilling, relied upon a 1967 title opinion which did not reflect any interest which United might have in the Butler B tract. After the Group realized production from its first well drilled on the Butler A tract in 1971, it contacted United, together with other prospective gas purchasers, relative to negotiations for sale of the gas. United wrote the Group on November 19, 1971, inquiring with regard to how the Group had acquired its interests in the leases. There is nothing in the record which casts any light on the negotiations. However, the Group did obtain a new title opinion on December 7, 1971, which for the first time disclosed to the Group United's 1953 Purchase Contract relating to the Butler B lease. Thereafter, in February, 1972, the Group discovered commercial gas from another well drilled on the Butler A tract. A title opinion of May 31, 1972, did not disclose any interest of United therein. In June of 1972, the Group concluded successful negotiations whereby it agreed to sell all of the gas it purchased from the Butler A and B leases to E. I. duPont deNemours & Company for industrial uses in *intrastate* commerce.

The Group successfully completed two more gas wells on the unitized tracts. Thereafter, on June 6, 1973, United notified the Group that it claimed all of the gas being produced from these tracts under and by virtue of its 1953 Gas Purchase Contract. The Group thereupon initiated a declaratory judgment action in the district court of Karnes County, Texas, against United. The action was removed to federal district court. On October 9, 1973, United filed a complaint with the FPC. Our reported opinion in *McCombs v. Federal Power Commission, supra,* detailed those proceedings leading to the Commission's adoption of the administrative law judge's conclusion that "the service authorized and the gas supply dedicated [under the original certificate involved here] include any and all gas produced from the Butler B acreage" and that, consequently, the intrastate sale to duPont was violative of the Natural

Gas Act. The administrative law judge further found that however negligent United may have been in asserting its rights under the 1953 Gas Purchase Contract and however innocent the Group may have been, that, notwithstanding, the Group should be ordered to cease and desist from continuing sales to duPont.

The basic matter for our determination of this rehearing relates to the issue of abandonment. The Commission held that there can be no abandonment of a certificate authorizing interstate service absent strict compliance with the requirements of petition, notice, hearing and establishment of cause for abandonment as required under 15 U.S.C.A. § 717(b) and § 717f(b).

Additional facts relating to the matter of abandonment set forth in our reported opinion in *McCombs v. Federal Power Commission, supra,* are appropriate here:

> To consider again some of the facts outlined above as they relate to this issue, the one producing gas well on the Butler B lease ceased producing early in 1966. The lease was assigned by Pagenkopf effective in March 1966, and the assignee, Haring, attempted to work over the well. During this work, about 3,000 Mcf was produced, but all production again ended in May 1966. The operator for Haring advised the gas purchaser, United, in December 1966 that the well was depleted. United thereafter in 1966 removed the equipment it had connected to the well. Thus, the only producing gas well was abandoned in the fall of 1966. The operator and the purchaser recognized that there could be no more gas delivered from the well. This was a physical fact beyond the control of either of them, and they recognized the realities of the situation. The operator or owner had tried to restore production but was unable to do so. The sellers and buyers wished to continue the sale and purchase of gas but could not do so. The record does not show that any gas was ever pro-

duced thereafter from this original well. The witness Haring who was the owner who attempted the workover, and who was a petroleum geologist, testified:

> "Certainy I was not aware of the gas reserves at deeper levels when the gas production ceased in 1966, and, as far as I know, neither United nor anyone else was aware of its existence."

In August 1968, the FPC wrote a letter to Pagenkopf suggesting that he file an application for abandonment. By an undated letter the Commission made a similar suggestion to the operator for Pagenkopf's successor, Haring. The FPC thus twice recognized that there had been no production for an extended time, and recognized that the abandonment should be formalized for its records. This must be acknowledged as a recognition by the Commission that there was in fact an abandonment, but there was something needed for the record. The records of the FPC as to this matter have apparently been destroyed under its procedures; consequently, it is not known what they may have indicated as to abandonment. The Commission in Opinion No. 740 in footnote 2 states as to the original proceedings for certification: "Our records indicate that Docket Nos. G-2997 and G-2998 were destroyed in 1964." It is apparent however from the testimony that no operator or owner filed a formal application to abandon.

542 F.2d at p. 1148.

In that same opinion we further observed and held:

> Thus we have a situation where there was an abandonment as a recognition of the indisputable physical facts beyond anyone's control. The Commission participated in this recognition as there were at least two suggestions by the Commission that someone file something to tidy up the records. These letters from the Commission must be taken, in view of the destruction of the supporting records, to be an acknowledgment that there was an abandonment. It is difficult to see how a formal application, and a decision by the Commission could have added anything to these letters. In these circumstances, we must hold that there was an abandonment which was recognized by the Commission, and its jurisdiction ended.
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> Thus we must hold as a matter of law that there was an abandonment sufficient under Section 7(b) of the Natural Gas Act. This being a matter of law, we do not consider it within the expertise of the Commission.
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> The "abandonment" we refer to is that contemplated under Section 7(b) of the Act, as above indicated. This is the only "abandonment" which is applicable to these circumstances. Section 7(b) refers to "service rendered," and the ordering of further "service" would have been a futile gesture. The seeking of an application by the Commission was a recognition of the fact that no more gas could be delivered from the only gas well, and that the "service rendered" had long since ceased contrary to everyone's wishes. This action by the Commission thus could only have reference to Section 7(b).
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> 542 F.2d at pp. 1148, 1149.

We know of no opinion dealing with a factual situation similar to that presented here. In light of the facts and circumstances contained and reflected in this record, we hold that the Commission erred in concluding that the cessation of gas production from the Butler B leasehold on May 28, 1966, did not constitute an abandonment under Section 7(b) of the Natural Gas Act.

I.

FPC contends that § 7(b) of the Natural Gas Act [15 U.S.C.A. § 717f(b)] is explicit in requiring that prior Com-

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mission approval must be obtained by any natural gas company before it can abandon any "facilities," or "service" involving the transportation and resale of gas dedicated by certificate to sale in interstate commerce. The full text of § 7(b) is as follows:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that present or future public convenience or necessity permit such abandonment.

To be sure, just as we previously recognized in *McCombs v. Federal Power Commission, supra,* the decisions are abundant and clear on the point that in those cases where the supply of natural gas is not depleted, the service must be continued via the facilities authorized. Obviously, there could be no finding by the Commission that the available supply of natural gas has been depleted under such circumstances. *United Gas Pipe Line v. Federal Power Commission,* 385 U.S. 83, 87 S.Ct. 265, 17 L.Ed.2d 181 (1966); *Sunray Mid-Continent Oil Co. v. Federal Power Commission,* 364 U.S. 137, 80 S.Ct. 1392, 4 L.Ed.2d 1623 (1960); *Sun Oil Co. v. Federal Power Commission,* 364 U.S. 170, 80 S.Ct. 1388, 4 L.Ed.2d 1639 (1960); *Atlantic Refining Co. v. Public Service Commission of New York,* 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed.2d 1312 (1959); *Phillips Petroleum Co. v. Federal Power Commission,* 556 F.2d 466 (10th Cir. 1977); *Farmland Industries, Inc. v. Kansas-Nebraska Natural Gas Co.,* 486 F.2d 315 (8th Cir. 1973); *Valley Gas Co. v. Federal Power Commission,* 159 U.S.App.D.C. 311, 487 F.2d 1182 (1973); *J. M. Huber Corp. v. Federal Power Commission,* 236 F.2d 550 (3rd Cir. 1956); *Panhandle Eastern Pipe Line*

Co. v. Michigan Consolidated Gas Co., 177 F.2d 942 (6th Cir. 1949). These decisions support the proposition advanced by this court in *Harper Oil Co. v. Federal Power Commission,* 284 F.2d 137 (10th Cir. 1960):

> It would thus seem clear that once an independent producer of gas has dedicated his production to interstate commerce and thereby has come under the jurisdiction of the Commission, he remains thereunder so long as production continues. [Citing to *Sun Oil Co. v. F. P. C.,* 364 U.S. 170, 80 S.Ct. 1388, 4 L.Ed.2d 1639.]
>
> 284 F.2d at p. 139.

We hold that, as a matter of law, based upon the facts and circumstances of the instant case, there was an abandonment under Section 7(b) of the Natural Gas Act which does not render the issue within the expertise of the Commission. Abandonment in the context of the facts and circumstances of this case cannot be equated with a voluntary "giving up" of valuable rights and/or property in the usual sense of relinquishment or surrender. Rather, the abandonment here presents the very practical recognition that there was no *service* to be rendered following the depletion of gas on December 5, 1966, from the Butler B leasehold. All parties recognized that for a period of five years thereafter no *service* could be rendered because the known gas reserves were depleted. These *facts* were acknowledged by all of the parties, including the Commission. Thus, the only known reserves of natural gas for which applications for certification had been made and authorized had been depleted. With its depletion and the subsequent five year period of non-service, there was no need for the formality of a Section 7(b) hearing. This is so because, in our view, all parties, including the Commission, considered that there were no gas reserves available following cessation of production and the subsequent efforts to restore production by workover methods in order to *service* the

public consumer, and, of course, to profit from the discovery and sale.

At oral argument, the FPC contended that the certificate originally granted authorized and dedicated all gas without regard to depth or sand/reservoir limitations, to sale in interstate commerce and that there cannot be an "abandonment in fact." The FPC further argued that its expertise is required as a prerequisite to any abandonment in that a formal hearing may or might see the presentation of expert evidence by the Commission that further reserves of natural gas are likely to exist at other depths, zones, reservoirs, etc., underlying the subject leasehold. Nevertheless, counsel for the Commission did acknowledge that in factual instances such as those presented here, proof of depletion and efforts to resurrect production by workover attempts have been acceptable evidence of depletion of gas for purposes of abandonment orders under Section 7(b).

The Commission urges that *Mitchell Energy Corp. v. Federal Power Commission*, 533 F.2d 258 (5th Cir. 1976) controls. That opinion held that although the 1949 contract between the gas producer and gas purchaser which dedicated all gas from the seller's interest in leaseholds and units in a particular field had expired in 1973, that nevertheless the successor in interest to the original producer was bound to dedicate the gas to interstate commerce because the successor assumed, as a matter of law, the original producer's obligations. That simply is not the case before us here. There had been no cessation of production in *Mitchell* and certainly no *depletion* of known reserves. *Mitchell* is not at variance with those decisions we have heretofore cited for the proposition that once natural gas is dedicated to interstate commerce it cannot be withdrawn from service in interstate movement without prior Section 7(b) FPC approval.

Our holding that strict compliance with the non-abandonment language of 15 U.S.C.A. § 717f(b), *supra*, does not

control under the facts and circumstances here is, we believe, buttressed by certain language contained in *Union Oil Co. of California v. Federal Power Commission*, 542 F.2d 1036 (9th Cir. 1976). At issue there was the FPC requirement that all producers of natural gas dedicated to interstate commerce annually submit a Form 40 containing detailed information about their natural gas reserves. The Court rejected the FPC contention that the reporting burden on the producers was outweighed by the Commission's need to have the reservoir data. The Court stated, in pertinent part:

> There is no evidence from which the FPC could conclude that the data required on Form 40 on a by reservoir basis were or could easily become available. The only evidence is to the contrary . . . Although there was no evidence before the Commission to contradict the unanimous statements of the producers that natural gas reserve data are not kept by them on a 'by reservoir' basis and that such data would be extraordinarily expensive to obtain, the Commission majority found that '[T]here is little doubt that the information required . . . is possessed by the respondents.' . . . This assertion is simply wrong . . . The Commission's factual determination that the data required are available is not supported by any evidence, much less by substantial evidence.
>
> 542 F.2d at p. 1042.

We conclude that the abandonment of the service in the instant case was accomplished, as a matter of law, when all of the parties recognized that the then known natural gas reserves were depleted in 1966 followed by failure to provide any service under the certificates for a period of five years during which time there was no evidence of other estimated gas reserves recoverable from the subject leaseholds.

We direct that all orders included in the Commission's Opinions Nos. 740, 740-A, and 740-B be set aside. We remand with directions that other pending proceedings in the Commission's Docket No. CP74-94 based on such orders be terminated and that the proceedings be dismissed.

IT IS SO ORDERED.

HOLLOWAY, Circuit Judge, dissenting:

I respectfully dissent. While the equities favor the McCombs Group, duPont and National, usual contract rules and equitable considerations do not control in this proceeding under the Natural Gas Act, in my opinion. Instead, there are mandatory statutory requirements on abandonment of service which were imposed to protect the public interests recognized by the Act, *Sunray Oil Co. v. FPC*, 364 U.S. 137, 143, 80 S.Ct. 1392, 4 L.Ed.2d 1623, and these provisions convince me that we should affirm the basic holding of the Commission in this case.[1]

The majority opinion reasons (p. 1380) that: there was an abandonment in fact after all production ceased in 1966 on the Butler B lease from then known productive formations, as recognized by the Commission and the parties; that with this recognized abandonment the Commission's jurisdiction ended; and that this abandonment was sufficient, as a matter of law, under § 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), and this being a matter of law, it was not within the expertise of the Commission.

To me these conclusions are directly contrary to the plain terms of § 7(b). The statute could hardly be clearer in saying that:

[1] The majority opinion does not reach other issues raised such as the propriety of the ruling on dissolution of the units and of the order requiring repayment to United of quantities of gas sold to duPont in the intrastate transaction, and the failure to sustain the motion challenging jurisdiction as to duPont. Thus it is unnecessary for me to address these issues. I will consider only the holding of the majority on the central abandonment issue.

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, *without the permission and approval of the Commission first had and obtained,* after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. (Emphasis added).

It is the *Commission* that must make the required findings and give approval before abandonment is legally effected, and not private parties by their agreement on the facts as to depletion and their consent to discontinuation of service. Nor does a determination by another tribunal that abandonment has occurred, as a matter of law, satisfy § 7(b). As the Supreme Court pointed out in *Sunray*, supra, 364 U.S. at 158 n.25, 80 S.Ct. at 1404:

> "It might be observed that in these cases the Commission issued certificates without time limitations. *Thus if the companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under § 7(b).* The Commission thus, even though there may be physical problems beyond its control, kept legal control over the continuation of service by the applicants. (Emphasis added).

See also *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 389, 79 S.Ct. 1246, 3 L.Ed.2d 1312; *Phillips Petroleum Co.* v. *FPC*, 556 F.2d 466, 469 (10th Cir.); *Mitchell Energy Corp. v. FPC*, 533 F.2d 258, 261 (5th Cir.).

The majority lays stress on the fact that production from the known reserves underlying the Butler lease was depleted in 1966, that there was testimony that neither United, the producer, nor anyone else was then aware of deeper reserves, and that as a practical matter there was no service that could be rendered thereafter from that lease. And, as the majority says, counsel for the Commission conceded that proof of such depletion and of failure of efforts to re-establish production has been accepted by the Commission in § 7(b) proceedings as a basis for permission for abandonment. Further the Commission did twice write suggesting that an application for abandonment be filed, which action the majority interprets as Commission recognition that there was in fact an abandonment.

However, there were other reserves as is now known, and United did state that while it would remove its metering equipment in 1966, it would reinstall such equipment whenever further gas might be delivered under the contract. (J.A. 137). In view of these circumstances it may not be quite certain what would have happened if application for a complete abandonment had been made, notice thereof had been given by publication,[2] and a final abandonment approval had been considered by the Commission. But, in any event, permission for abandonment of all service was for the Commission and we cannot make the findings and give the approval which Congress deemed it necessary for the Commission to make. *Sunray*, supra, 364 U.S. at 142, 80 S.Ct. 1392.

[2] The Commission's regulations required notice by publication and mailing to States affected by the application, see 18 CFR § 157.9 (January 1, 1969), and permitted petitions for interventions by persons desiring to participate. See 18 CFR § 157.10 (January 1, 1969). Pipeline purchasers have been permitted to intervene in such proceedings. See *e. g., Transcontinental Gas Pipe Line Corp. v. FPC*, 160 U.S.App.D.C. 1, 2-3, 488 F.2d 1325, 1326-27, cert. denied sub nom. *Natural Gas Pipeline Co. v. Transcontinental Pipe Line Corp.*, 417 U.S. 921, 94 S.Ct. 2629, 41 L.Ed.2d 226.

The Commission noted in its Opinion 740 that the original 1953 contract covered merchantable natural gas produced from all wells now or hereafter drilled during the 10-year term of that contract (later extended to 1981) on specified leaseholds including the Butler B tract, and further noted that there was no mention of any particular depths in that contract. (J.A. 160-61). Further, the McCombs Group now does not contest the fact of delivery of gas from the Butler B lease to United.[3] Such delivery constituted both a sale under the contract and commencement of a "service" obligation in interstate commerce under the Act. *Phillips Petroleum Co. v. FPC*, supra, 556 F.2d at 469. As this delivery was made under a contractual dedication without limits as to depths, there was a dedication to interstate commerce of the underlying reserves in question, and the effort to resell the same gas amounted to an attempted abandonment, which could not be done without first obtaining approval of the Commission under § 7(b). Ibid.

For these reasons I would sustain the Commission's conclusion that the commencement of service completed dedication to United in interstate commerce and thereby invoked the protection of § 7(b). (J.A. 163). And concluding that procedures made mandatory by the Act have not been complied with, I must dissent.

[3] The McCombs Group says that the statement by United indicating that the record shows that gas was received by United from the Butler B lease should be read with some caution. The McCombs Group points to the absence of evidence in the original record that gas was actually delivered from the Butler B lease to United, but recognizes that United later presented some evidence on the point in subsequent proceedings before the Commission. The McCombs Group states that since it is not seeking merely a remand, it has not raised the delivery of Butler B gas to United as an issue in this review proceeding, except as evidence of the Commission's partiality toward United. (Reply Brief of McCombs Group, 2).

SUPREME COURT OF THE UNITED STATES

No. 78–17

UNITED GAS PIPE LINE COMPANY, PETITIONER,

v.

BILLY J. MCCOMBS, ET AL.

Order Allowing Certiorari. Filed October 10, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is consolidated with No. 78–249 and a total of one hour is allotted for oral argument.

Mr. Justice Stewart took no part in the consideration or decision of this petition.

SUPREME COURT OF THE UNITED STATES

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FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER,

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U. S. GOVERNMENT PRINTING OFFICE : 1978 O • 278-145

In the Supreme Court of the United States

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Petitioners,

VERSUS

BILLY J. McCOMBS, ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENTS BILLY J. McCOMBS, ET AL., IN OPPOSITION

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September 13, 1978

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BRIEF OF RESPONDENTS BILLY J. McCOMBS, ET AL., IN OPPOSITION

Respondents, Billy J. McCombs, R. J. Stillings, d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corp. and Bill Forney ("McCombs") in this brief oppose petitions for writs of certiorari which have been filed by United Gas Pipe Line Company ("United") and the Federal Energy Regulatory Commission ("Commission") for a review of the decision of the United States Court of Appeals for the Tenth Circuit.

I.
QUESTION PRESENTED

The question is *not* one of primary jurisdiction of the Commission to determine abandonment of service under Section 7(b) of the Natural Gas Act (as contended by United) and is *not* whether a court of appeals may independently determine that service has been abandoned (as contended by the Commission). This action originated in a proceeding before the Commission, and was fully and finally disposed of by the Commission.

The only question is whether or not the court of appeals properly held that the Commission erred in failing retroactively to apply the Act to reflect compliance therewith where there had been a good faith failure to file abandonment papers by McCombs' predecessor, where McCombs was innocent of that failure, and where abandonment would have been routinely granted had the proper papers been filed at the proper time.

II.
STATEMENT OF THE CASE

A. Introduction.

"A most recent interesting case, unique in its facts and therefore of limited applicability, is *McCombs* v. *FPC*." Conine and Niebrugge, *Dedication Under the Natural Gas Act: Extent and Escape*, 30 Okla. L. Rev. 735, 795 (1977).

"The evidence relied upon by the court in the *McCombs* case was highly unusual and was based on a particular set of facts that may not exist in other situations." Producer Subcommittee of Natural Gas Committee, *Report*, 10 Nat. Res. Law. 129, 130 (1977).

The following statement is submitted inasmuch as both the Commission's and United's statement of the case omit certain facts deemed relevant by McCombs.

B. Proceedings Below.

On October 9, 1973, United filed a complaint in this matter with the Commission, alleging that McCombs is required to deliver production from a certain oil and gas lease, located in Karnes County, Texas (the "Butler B Lease") to United under Section 7 of the Natural Gas Act, 15 U.S.C. Sec. 717, *et seq.* (1976). Hearings were held before the Commission on January 10, and February 13 and 14, 1974. The Administrative Law Judge issued his initial

decision on April 26, 1974, finding that "however innocent" McCombs may have been and "however negligent United may have been in asserting its rights," McCombs was required to cease delivering gas from the Butler B Lease to E. I. du Pont de Nemours & Company ('du Pont") in intrastate commerce, and to commence delivering that gas to United in interstate commerce. The Judge refused McCombs' request to authorize abandonment as of 1966, as if the proper papers had been filed then, which refusal was duly put before the Commission on exceptions. (Separate Appendix to United's Brief, pp. 15, 21.)

On August 20, 1975, the Commission issued Opinion No. 740, holding, *inter alia*,

> "Whatever action the Commission may have taken under [Section 7(b)] from the time production ceased in 1966 until it was resumed in 1971, it cannot consider abandonment or abandonment *nunc pro tunc* where the supply of natural gas is not depleted." (Separate Appendix to United's Brief, p. 31.)

On judicial review, the court below held that the Commission erred in this respect.

> "In the light of the facts and circumstances contained and reflected in this record, we hold that the Commission erred in concluding that the cessation of gas production on May 28, 1966, did not constitute an abandonment under Section 7(b) of the Natural Gas Act." (Commission Appendix, pp. 9a, 10a.)

C. The Butler B Lease and the 1953 Contract.

In 1948, B. C. Butler, Sr., *et al.*, Lessors, executed the Butler B Lease in favor of W. R. Quin, Lessee, covering 163 acres of land in Karnes County, Texas. In 1953, Mr. Quin's widow, Bee Quin, entered into a gas purchase contract (the "1953 Contract") with United covering the sale of gas well gas from the Butler B Lease. In 1954, the Commission granted certificates of public convenience and necessity to Bee Quin. The Butler B Lease was thereafter transferred several times, and in March of 1966 came to rest in the hands of Louis H. Haring, *et al.* ("Haring").

At the time of that acquisition, there was one well located on the Butler B Lease, but it was not producing. Haring unsuccessfully attempted to establish production from this well, during which a small amount of gas was obtained. All production from this well ceased on May 28, 1966.

United and Haring exchanged correspondence reflecting that there would be no more gas available. United then removed its measuring equipment, and Haring testified that he considered the 1953 Contract to be at an end. Although the term of the Butler B Lease was only for so long as production therefrom continued, the lease did not terminate because Haring drilled an oil well on the Butler B Lease, the production from which perpetuated the lease.

Haring, a petroleum geologist, testified, "Certainly I was not aware of the gas reserves at deeper levels when the gas production ceased in 1966, and, so far as I know, neither United nor anyone else was aware of its existence."

By letters dated August 8, 1968, and January 13, 1971, the Commission invited Haring to file an abandonment application and a notice of cancellation of the rate schedule. Because production had ceased, and because he was unaware of other production and he considered the 1953 Contract to have been ended, Haring testified that he and his counsel thought it unnecessary to file these papers. Until the hearing in this proceeding, McCombs did not know that Haring had not obtained abandonment permission.

D. McCombs.

There were no further developments concerning the Butler B Lease until 1970 or 1971, when Bill Forney, operator for McCombs, became interested in the possibility of deeper reserves in the area. Forney entered into a contract with Haring providing that Haring would assign Forney certain deep levels of the Butler B Lease in exchange for the drilling of a well.

Mr. Forney obtained from Haring a title opinion dated March 6, 1967 covering the Butler B Lease. This title opinion makes no reference to the 1953 Contract.

Mr. Forney commenced the drilling of the Butler No. 1 Well on August 27, 1971. He testified that at this time, in reliance on the 1967 title opinion, he believed his title to be clear. This well was completed as a producer of gas from two deep zones and earned an assignment from Haring of certain deep levels of the Butler B Lease.

After the completion of the Butler No. 1 well, McCombs began to contact purchasers concerning the gas. United was the first purchaser contacted. Although other

purchasers were also contacted, negotiations did not proceed to any great extent with them. United made four written offers for a contract, the first in November of 1971, and did not claim any rights under the 1953 Contract or the Natural Gas Act. United's best offer was 35¢ per Mcf for the first fourteen months, and a lower rate thereafter. As this was not satisfactory, negotiations were broken off with United, and the producers sought another market.

McCombs then entered into negotiations with du Pont resulting in a letter agreement dated April 12, 1972 with Lo Vaca Gas Gathering Company under which temporary deliveries were commenced on May 12, 1972, and culminating in a contract dated June 1, 1972, with du Pont. The contract provided for the same initial rate as United's offer, but with more satisfactory escalation provisions. Prior to April 12, 1972, United was aware that McCombs intended to sell the gas to an intrastate purchaser.

E. United Asserts Its Claim.

On June 6, 1973, more than one year after deliveries had commenced to du Pont, and more than a year and a half after United first offered to purchase the gas, United first claimed the right to purchase McCombs' gas from the Butler B Lease under the 1953 Contract. On August 2, 1973, McCombs filed suit for declaratory judgment that the 1953 Contract was void, and for other relief. United counterclaimed for damages. That case is styled *Billy J. McCombs, et al.* v. *United Gas Pipe Line Company, et al.*, No. SA-73-CA-210 in the United States District Court for the Western District of Texas at Austin (the "Austin Liti-

gation"). Although discovery and pre-trial procedures in that case have been substantially completed, the case is presently being held in abeyance pursuant to the agreement of counsel, pending completion of the instant litigation.

III.
REASONS FOR DENYING THE WRIT

A. The Court Below Did Not Exceed Its Authority, Nor Have the Commission's Processes Been Bypassed.

1. *Introduction.* This case deals with the consequences of a good faith failure of the proper party to file the proper papers with the Commission at the proper time. The courts have addressed similar situations arising from the Commission in three cases. In *Plaquemines Oil and Gas Company* v. *FPC*, 450 F.2d 1334 (D.C. Cir. 1971) and *Highland Resources Inc.* v. *FPC*, 537 F.2d 1336 (5th Cir. 1976), the party had failed in good faith to file and the court required a retroactive application of the Act, as if the party had *complied* at the time required. In *Niagara Mohawk Power Corporation* v. *FPC*, 379 F.2d 153 (D.C. Cir. 1967), and similar cases, the Commission itself retroactively applied the Act as if the party had complied at the time required.

In the instant case, the Commission was similarly asked to apply the Act retroactively as of 1966. In the light of the evidence existing at that time, the court below found that the Commission's failure to do so was erroneous.

The court held that the Commission had erred *as a matter of law* — not as to a matter of a fact. That is, the

error committed was not as to a factual issue within the expertise of the Commission. Instead, the Commission's error consisted of considering the wrong evidence in refusing to retroactively apply the Act. The Commission disregarded the only evidence in the record concerning the facts as they existed in 1966, when the papers should have been filed, and applied the evidence as it existed in 1975, when it issued its Opinion. The *only* evidence concerning the facts existing in 1966 was the testimony of Haring, a petroleum geologist, that he had failed after diligent efforts to restore production, and that neither he nor United nor anyone else knew of any other reserves. Since the Commission could have reached but one conclusion based on this evidence, the court deemed it unnecessary to remand to the Commission to enter an order accordingly.

The court's holding is also within its equitable powers, for it fails to impose the devastating consequences of Haring's omissions on an innocent third party, McCombs.

2. *Haring's Actions Were in Good Faith.* When Haring acquired the Butler B Lease in 1966, the one gas well located on the lease was not producing. He expended considerable efforts in attempting to re-establish production but his efforts ended in failure. He testified that he first installed a compressor at a cost of $12,000, and the well produced for approximately ten days and then was overcome by salt water. He then brought in a workover rig and attempted workover operations for approximately two months during which small amounts of gas were produced. All production ceased on May 28, 1966. Haring was a petroleum geologist, and testified that neither he nor United,

nor anyone else knew of any further production. Since he believed that there was no more gas to deliver, and since United had removed its equipment, he testified that he considered the 1953 Contract at an end. When he received the Commission's letters inviting him to file an abandonment application, he consulted with his lawyer. Neither Haring nor his counsel thought it necessary to file abandonment papers with the Commission under these circumstances.

Their conclusions appear justified in the light of the existing judicial statements. In *Hunt* v. *FPC*, 306 F.2d 334, 342 (5th Cir. 1962), the Court had said,

> ". . . the duty to continue to deliver and sell flows with the gas from the moment of first delivery *down to the exhaustion of the reserve*, or until the Commission, on appropriate terms, permits cessation of service under Sec. 7(b) . . ." (emphasis added)

And in *Harper Oil Company* v. *FPC*, 284 F.2d 137, 139 (10th Cir. 1960), the Court had said:

> "It would thus seem clear that when once an independent producer of gas has dedicated his production to interstate commerce and thereby has come under the jurisdiction of the Commission, he remains thereunder *so long as production continues.*" (emphasis added)

Indeed, as recently as April 17, 1978, in oral argument before this Court in the case of *State of California* v. *Southland Royalty Company*, 46 U.S.L.W. 4539 (U.S. May 31, 1978), the Commission adhered to those statements:

> "The Commission's position here is that this gas is dedicated *until the reserve is exhausted*, that in the

> words of the *Hunt* case the duty to continue to deliver and sell flows with the gas from the moment of first delivery *down to the exhaustion of the reserve.*" (emphasis added) Transcript, p. 11.

Haring justifiably could not believe that he would be required to continue service after no more gas could be produced from his well.

United, like Haring, did not think it necessary to file abandonment papers with the Commission when it removed its facilities, although Section 7(b) of the Act is equally binding on it. *United Gas Pipe Line Company* v. *FPC*, 385 U.S. 83 (1966). Similar to Haring, United's witness testified that ". . . we don't feel that's necessary."

In the light of the facts as they were known then, the filing could only have been for the purpose of the Commission's records, for the Commission could have taken no action in denying abandonment which was inconsistent with the facts. Further, the Commission, until the issuance of its opinion in the instant case, had done nothing to dispel the courts' statements in the *Hunt* and *Harper* cases, and according to the oral argument in *Southland*, continues to adhere to them today.

Haring's actions must be said to be justified, reasonable, and in good faith.

3. *Abandonment Permission Would Have Been Routinely Granted in 1966.* The Commission handles nearly all producer abandonment applications in routine fashion, merely acting on the papers without a formal evidentiary hearing. In 1966, the Commission disposed of 154 producer

abandonment applications. Of these 154, only one was set for formal hearing and it was granted. *Charles L. Reed, et al.*, 35 FPC 954 (1966). The remaining 153 were disposed of without formal hearing, with 151 being granted. *See Producer List*, Producer Applications for Abandonment of Service Disposed of During the Period January 1, 1966 through June 30, 1966, 35 FPC 1201-1203 (1966); *Producer List*, Producer Applications for Abandonment of Service Disposed of During the Period July 1, 1966 through December 31, 1966, 36 FPC 1216-1221 (1966).

In light of the facts as Haring knew them in 1966, there is no doubt that the Commission would have granted him abandonment permission and probably would have done so in a routine fashion, as indicated above.

B. The Commission's Powers in the Administration of the Natural Gas Act Will Not Be Eroded by the Decision Below.

The decision below merely requires the retroactive application of the Act in a proper case, which is something the Commission has been doing since sometime prior to 1944. *See Metropolitan Edison Company*, 6 FPC 189 (1947). *See also* the *Androscoggin* case, *Public Service Company of New Hampshire*, 27 FPC 830 (1962); *Niagara Mohawk, supra* at 156, *et seq.*

The Commission's Opinion was issued in 1975, and no similar producer cases have arisen under Section 7(b) before or since. Nor does it appear likely that any will arise, because of the unusual facts of this case. Haring believed, in good faith, that the filing was unnecessary, as

opposed to merely being ignorant of the law. The Butler B Lease did not terminate with the cessation of production, as would ordinarily occur, but was perpetuated by some oil production. McCombs was unaware of Haring's omissions, or of the existence of the 1953 Contract. McCombs entered into its contract with du Pont without notice that United was claiming rights under the 1953 Contract or Section 7(b) of the Act. In fact, United had negotiated with McCombs for this very gas, and was aware that McCombs intended to sell the gas to another purchaser, prior to the time the du Pont contract was entered into. Had United notified McCombs before its gas was irrevocably committed to another purchaser, McCombs would have had an opportunity to prevent this case from arising. These circumstances are indeed unique and are not likely to be repeated. Nor is the view that this case is unique, and hence not deserving of this Court's consideration, simply a view held by McCombs' advocates in this proceeding. Scholarly comment is in accord, as indicated by the quoted material on page 3 above. The fact is that this case presents no issue of public law significance so as to justify the granting of the writs of certiorari.

C. Neither the Interstate Market Nor United Will Suffer as a Result of the Decision Below.

The amount of gas in this proceeding is exceedingly small in relation to United's requirements. In response to a motion filed on April 12, 1976, in the court below, McCombs showed that the remaining gas attributable to the Butler B Lease was less than two days supply for United's system.

Although the amount of gas is small, the decision below will permit the Austin Litigation to go forward, and United will have an opportunity to make itself and its customers whole in that forum.

D. There Is No Conflict Among the Circuits.

United, but not the Commission, attempts to raise a conflict with *Mitchell Energy Corp.* v. *FPC*, 533 F.2d 258 (5th Cir. 1956). This contention was properly dismissed by the court below for the reason that, in *Mitchell*, in addition to other factual differences, there had been no cessation of production and certainly no depletion of known reserves.

IV.
CONCLUSION

The decision below was a proper reversal of the Commission's failure to apply the Act retroactively as if Haring had complied therewith. The case is highly unusual, and is not important to the Commission's administration of the Natural Gas Act. It is therefore submitted that there are no special or important reasons for granting the petitions for writs of certiorari filed by United and the Commission, and that they accordingly should be denied.

Respectfully submitted,

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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v.

BILLY J. MCCOMBS, ET AL.

No. 78-249

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

BILLY J. MCCOMBS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION

In this case the court of appeals held that respondents' predecessors had lawfully abandoned a certificated service in natural gas under Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b), when they terminated delivery in 1966, even though they never applied to the Commission for abandonment, the Commission never authorized abandonment, and it is undisputed that the supply of gas is not depleted.

Respondents, opposing the petitions for a writ of certiorari, contend (1) that previous decisions establish that the Commission and the courts may deem an abandonment application to have been effectively filed and granted at some previous time where the person who should have filed the application at that time but failed to do so acted in good faith (Br. in Opp. 8-9), and (2) that the failure to file in this case was in good faith (Br. in Opp. 9-12). Those contentions are incorrect.

The cases cited by respondents (Br. in Opp. 8)[1] did not involve abandonment under Section 7(b) and have no bearing on this case. In *Plaquemines* (note 1, *supra*), the Commission had asserted jurisdiction over the producer's sales in 1961, but the producer had failed to apply for a certificate authorizing the sales until 1966. The Commission held that the sales from 1961 to 1966 were subject to Commission rate regulation, and to possible refund orders, as if the producer had applied in 1961 as required. The court of appeals affirmed on the principle that (450 F. 2d at 1337-1338):

> The Commission, in acting upon applications for certification filed some time after Commission jurisdiction was asserted * * * has the equitable power "to regard as being done that which should have been done" by recreating the past, insofar as

[1] *Plaquemines Oil and Gas Co.* v. *Federal Power Commission*, 450 F. 2d 1334 (D.C. Cir. 1971); *Highland Resources Inc.* v. *Federal Power Commission*, 537 F. 2d 1336 (5th Cir. 1976); and *Niagara Mohawk Power Corp.* v. *Federal Power Commission*, 379 F. 2d 153 (D.C. Cir 1967).

> is reasonably possible, to reflect compliance with the Act and to order refunds to be paid if necessary to achieve that goal.[2]

The same principle was applied in *Niagara Mohawk* (note 1, *supra*), where a utility had built hydro-electric projects for which it should have sought Commission licenses in 1941 and 1949, but did not apply for the licenses until 1962. Because calculation of administrative charges depended on the date the licenses were granted, the Commission in 1964 issued the licenses with effective dates of 1941 and 1949. The court approved the Commission's actions as simply imposing "a condition that puts the wrongdoer in no worse stance than the company that has punctiliously observed the requirements of law * * *." 379 F. 2d at 159.

Thus, *Plaquemines* and *Niagara Mohawk* stand for the proposition that where a party has taken action without seeking the required authorization from the Commission, the Commission may fashion a remedy on the basis of the assumption that authorization was sought and obtained at the proper time, in order to prevent the party from benefiting from its failure to comply with the statutory requirements.[3] Nothing in either case supports the claim

[2] The court remanded the case with respect to certain refunds the Commission had ordered on the ground that the Commission had apparently not applied the general principle to those refunds. 450 F. 2d at 1338-1341.

[3] *Highland Resources*, note 1, *supra*, although not involving precisely the same principle, is also inapposite here. In that case a producer failed to file an application for increased rates prior to a Commission-established deadline, in good-faith reliance on Commission pronouncements that a producer in its position did not have to file. In those circumstances the court of appeals held that the Commission should treat the producer's late-filed application as if it had been filed in time. 537 F. 2d at 1338-1339. In contrast, the

that a court may retroactively authorize the abandonment of dedicated service when the producer has failed to seek or obtain the required Commission approval. Indeed, the principle of these cases—that a party may not evade the obligations of the Act by failing to comply with its procedural requirements—supports our position. Contrary to that principle, the decision of the court of appeals here rewards respondents for the failure to comply with the requirements of Section 7(b).

Respondents' further contention that their predecessor Haring's failure to file for abandonment was in good faith is refuted by, among other things, the undisputed fact (see Br. in Opp. 6) that the Commission, on two occasions, informed Haring that an abandonment application was required.[4]

Commission here never informed respondents' predecessors that no abandonment application needed to be filed; rather, it twice informed them that abandonment applications did have to be filed.

[4]Respondents' assertion (Br. in Opp. 9) that "[t]he *only* evidence concerning the facts existing in 1966" indicated that the supply of gas was depleted overlooks the fact that, if abandonment had been sought and a hearing conducted by the Commission as required by Section 7(b), the facts adduced in evidence might have revealed the existence of the substantial reserves that were subsequently discovered. Indeed, this case illustrates the importance of the procedures established by Section 7(b) in ensuring that abandonment does not depend on the producer's unilateral determination of the facts.

For the foregoing reasons and the reasons set forth in our petition for a writ of certiorari, it is respectfully submitted that the petition should be granted.

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OCTOBER 1978

DOJ-1978-10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-17

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

BILLY J. McCOMBS, *et al.*,
Respondents.

No. 78-249

FEDERAL ENERGY REGULATORY COMMISSION,
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On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF PETITIONER UNITED GAS PIPE LINE COMPANY

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November 24, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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BRIEF OF PETITIONER UNITED GAS PIPE LINE COMPANY

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 570 F.2d 1376 and is printed in the Appendix. (App. 23.)[1] Opinion Nos. 740 (Pet. App. 1) and 740-A (Pet.

[1] The appendix in this case consists of two separate printed volumes: (1) the Appendix (tan cover) filed with the briefs on the merits in the consolidated proceeding and (2) the Appendix to

App. 46) of the Federal Power Commission are reported at 54 FPC 755 and 2034, respectively. Opinion No. 740-B (Pet. App. 70) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1978. (Pet. App. 94.) An order denying petitions for rehearing and suggestions for rehearing in banc filed by United Gas Pipe Line Company ("United") and the Federal Energy Regulatory Commission ("Commission")[2] was entered on April 4, 1978. (Pet. App. 95.) United filed a timely petition for a writ of certiorari in this Court on July 3, 1978 in No. 78-17. By orders dated October 10, 1978, the Court granted United's petition and the petition of the Commission in No. 78-249, and consolidated the two cases. (App. 39, 41.) This Court has jurisdiction under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), and under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Do the prerequisites for abandonment of Section 7(b) of the Natural Gas Act (*i.e.*, permission and approval of the Commission after due hearing and a prescribed finding by the Commission) apply to a producer's certificated service obligation if gas production

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Petition for Certiorari (white cover) filed July 3, 1978 in No. 78-17, United Gas Pipe Line Co. v. Billy J. McCombs, *et al.* References to items contained in the Appendix for the consolidated proceeding will be cited as "App.," while references to items contained in the Appendix to Petition for Certiorari will be cited as "Pet. App."

[2] "Commission" is used herein to refer both to the Federal Energy Regulatory Commission and to its predecessor, the Federal Power Commission.

ceases from the reserves known to exist on the dedicated acreage?

STATUTES INVOLVED

Principally involved is Section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), which provides:

> *Abandonment of facilities or services; approval of Commission*
>
> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

Also involved is Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), which, because of its length, is set out separately in the appendix attached to this brief.

Similarly, Section 2(18) and Section 601(a)(1)(A) of the Natural Gas Policy Act of 1978[3] are also pertinent and, because of their length, are separately set out in the appendix to this brief.

STATEMENT OF THE CASE

A. Nature of the Case.

As in this Court's recent decision in *California* v. *Southland Royalty Co.*,[4] the issue here is whether a nat-

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[3] Pub. L. No. 95-621, 92 Stat. 3350 (1978).

[4] 436 U.S. 519 (1978).

ural gas producer's certificated service obligation has terminated without Commission approval of abandonment pursuant to Section 7(b) of the Natural Gas Act. In this case, the court below held that when production ceased from the known reserves on the lease in question there was an abandonment even in the absence of Commission authorization, thus bypassing the Commission's authority to withhold or condition abandonment approval and foreclosing the rights of other parties to be heard on the issue.

B. Facts.

1. Butler B lease and 1953 gas purchase contract.

On May 20, 1948, W. R. Quin obtained an oil and gas lease (the Butler B lease), covering approximately 163 acres in Karnes County, Texas. (Ex. 17; R. 242, 495-500.) On April 29, 1953, Bee Quin, his widow, entered into a gas purchase contract with United, agreeing to sell to United the natural gas production from and attributable to certain leaseholds, including the Butler B lease.[5] (Ex. 1; R. 45-46, 53, 364-401.)

There was no depth limitation in the lease or in the contract. The contract accorded United the right to purchase the "merchantable natural gas . . . produced from all wells now or hereafter drilled during the term of this contract on the lands and leaseholds" covered by the contract. (R. 45-46, 365.) The primary term of the contract was ten years but by subsequent amendment dated February 7, 1961 was extended until February 7, 1981. (Ex. 1; R. 45-46, 53, 364-401.)

[5] By agreement dated September 7, 1954, the 1953 contract was amended to cover additional leaseholds, including the "Butler A lease" referred to in the opinion of the court below. (Ex. 1; R. 53, 364-401.)

2. Commission certification.

Following this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*,[6] Mrs. Quin applied to the Commission for certificates of public convenience and necessity authorizing the sale of the natural gas covered by the 1953 contract in interstate commerce to United. (R. 46, 1123-38.) Her applications were granted by orders issued December 8, 1954 and December 14, 1954 in Docket Nos. G-2997 and G-2998, respectively. (R. 46.) United installed a gathering facility and an above-ground field measuring station on the Butler B tract and received natural gas for its interstate pipeline system pursuant to the certificates issued to Mrs. Quin. (R. 46, 79-81, 206-07.)

3. Termination of production.

By a succession of transfers,[7] a group headed by Louis H. Haring became owner of the leasehold interest in the Butler B tract on March 1, 1966. (Ex. 15; R. 199, 455-67.) In April and May of 1966, Bay Rock Corporation, as operator for the Haring group, produced gas from the Butler B lease and sold it to United

[6] 347 U.S. 672 (1954).

[7] Among the successors to Mrs. Quin was H. A. Pagenkopf, Trustee. On June 19, 1963 in Docket No. G-12694, the Commission issued Pagenkopf a successor in interest certificate to continue the service initiated by Mrs. Quin. (R. 46-47; Pet. App. 5-6.) Contrary to the indication in the opinion of the court below (App. 28), the Commission's records in Docket No. G-12694 are intact. It is only the records in Docket Nos. G-2997 and G-2998 that were superseded by the successor in interest certificate in Docket No. G-12694 that are not available. (Pet. App. 30-35.)

pursuant to the 1953 contract. (R. 47, 201, 206-07.) On May 28, 1966, production ceased from the Butler No. 7 gas well, which was the only well producing gas on the lease at that time.[8] (R. 201, 206.) Thereafter, Bay Rock wrote United that the existing gas wells were depleted and that no other gas would be available at that time. (Ex. 3; R. 47, 54, 403; Ex. 30; R. 242, 576-77.) On December 7, 1966, United advised Bay Rock that it intended to remove its measuring facilities for use elsewhere on its system but that such equipment would be reinstalled "[i]f, at some future date, you have further gas to deliver to us at the above delivery point, which will be subject to the terms of the above captioned contract. . . ." (Ex. 4; R. 47-48, 55, 404; Ex. 31; R. 242, 578-79.)

Thereafter, no additional natural gas was produced from the Butler B lease until 1971. However, in August 1966, Bay Rock drilled a producing oil well, thereby keeping the Butler B lease in effect. (R. 201-02.)

In August 1968 and January 1971, letters from the Secretary of the Commission were sent to the producers advising them that if no further sales of gas were contemplated, it would be necessary for them to file applications to abandon service. (Pet. App. 97, 100.)[9] The producers, however, never attempted to secure Commission approval for abandonment, nor did they raise the issue with United. (R. 211-12.)

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[8] United's records reflect that production did not cease until September 1966. (R. 47; Ex. 29; R. 242, 574-75.)

[9] The letters are not part of the record. They were, however, considered in the decision of the court below. (App. 28-29.)

Although Haring testified that after 1966 he considered that the 1953 contract terminated[10] (R. 202, 208-12), United continued to regard the contract as being in effect and administered it as such for purposes of its own records. (R. 48, 218-19.) Moreover, by letter dated June 23, 1969, United notified Haring that it would be willing to reset the price under the 1953 contract at 18.3¢ per Mcf for the five-year period beginning June 19, 1969, but that in the absence of current deliveries it had not prepared an agreement for this purpose. (Ex. 5; R. 55, 405.) The record reflects no response from Haring. (R. 219.)

4. New production.

In 1971 and 1972, Haring assigned his working interest rights in certain deep horizons underlying the Butler B lease to National Exploration Company ("NEC") and to the Respondents known as the McCombs Group. (R. 202-03; Ex. 22; R. 242, 514-29; Ex. 23, R. 242, 530-42.) In 1971 the new working interest owners discovered gas in these lower depths. (R. 203, 253-54.)

Thereafter, the McCombs Group contacted representatives of United in an effort to market the gas, and according to the testimony of United's witness, represented to United that none of the production involved was from dedicated acreage. (R. 89-90.) On November 19, 1971, United tendered a written offer of purchase, but noted in the transmittal letter that it had a gas purchase contract (the 1953 contract) which covered acreage in the area of the new well. Accordingly, it re-

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[10] Haring also testified that when production ceased in 1966, he was unaware of any gas reserves at lower levels. (R. 203.)

quested the McCombs Group to advise it as to the manner in which the right to produce the gas in question had been secured. (Ex. 6; R. 49, 55, 406; Ex. 26, R. 242, 555-61.) United's records contain no evidence that the McCombs Group ever responded to this request. (R. 49, 97-98.) However, by title opinion dated December 7, 1971, the McCombs Group was itself advised that the Butler B tract was subject to the 1953 contract with United.[11] (R. 256-57; Ex. 28; R. 242, 567-73.) Nevertheless, by contract dated June 1, 1972, the McCombs Group sold the Butler B gas on the intrastate market to Respondent E. I. du Pont de Nemours & Company ("du Pont") for industrial consumption and informed United that the gas was no longer for sale. (R. 262-63; Ex. 35; R. 242, 627-60.)

In January 1973, NEC advised United that in the course of preparing division orders, it had discovered that the 1953 contract appeared to cover the land where the deeper production was located. (R. 50.) To determine the extent of its rights, United undertook a title search which was concluded on May 29, 1973. (R. 50.) By telegram dated June 6, 1973, United formally notified all appropriate parties, including du Pont, that in United's view sales of gas from the Butler B lease, other than sales to United, would constitute a violation

[11] United was not advised of the 1971 title opinion. (R. 283-84.) A prior title opinion dated March 6, 1967 and made available to the McCombs Group by Louis Haring contained no mention of United's 1953 gas purchase contract. (Ex. 25; R. 242, 550-54.) However, in conveying his interests to the McComb's Group, Haring did not include general warranties of title and freedom from encumbrances. (Ex. 23; R. 242, 530-42.)

of the 1953 contract.[12] (Ex. 7, R. 50, 55, 407-08.) Notwithstanding objection by United, the McCombs Group continued to sell all the new gas production attributable to the Butler B lease to Respondent du Pont in intrastate commerce.

C. Proceedings Before the Commission.

Acting on a complaint by United, the Commission in Opinion No. 740, issued August 20, 1975, found that the service under the 1953 contract had been initiated as authorized, so that production from the Butler B tract was dedicated to interstate commerce. (Pet. App. 1, 29-36.) The Commission held that, since there had been no abandonment under Section 7(b), the Butler B gas was required to be delivered to United and that the sales of gas in intrastate commerce were in violation of Section 7.[13]

D. Proceedings in the Court Below.

The McCombs Group and du Pont petitioned the United States Court of Appeals for the Tenth Circuit for review of the Commission's determination.[14] Pending review, the court stayed the effect of the Commission's order so that subsequent gas production from the Butler B lease has all been sold in intrastate commerce. (App. 21.)

[12] On August 2, 1973, the McComb's Group filed suit for declaratory judgment as to United's rights under the 1953 contract, which suit is currently in abeyance. McCombs v. United Gas Pipe Line Co., No. SA-73-CA-210 (W.D. Tex., filed August 2, 1973).

[13] In Opinion No. 740-A, issued November 7, 1975, the Commission denied rehearing. (Pet. App. 46.) On January 19, 1976, the Commission issued Opinion No. 740-B dealing with issues not involved in the instant proceeding. (Pet. App. 70.)

[14] Jurisdiction was based upon Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

On October 18, 1976, the Tenth Circuit issued its initial decision in which it reversed the Commission.[15] (Pet. App. 81.) On petitions for rehearing by both United and the Commission, the court on May 2, 1977 granted rehearing (Pet. App. 92), and on October 18, 1977 withdrew and vacated its first opinion and judgment. (Pet. App. 93.)

On February 9, 1978, the court, with one judge dissenting, entered its opinion and judgment on rehearing reaching the same result as in its previous opinion. (App. 23; Pet. App. 94.) The majority held that since production had ceased in 1966 from all gas reservoirs then known to exist, "there was an abandonment under Section 7(b) of the Natural Gas Act which does not render the issue within the expertise of the Commission." (App. 31.) Judge Holloway dissented on the ground that the Section 7(b) procedures are mandatory.[16] (App. 34-37.)

In response to petitions by United and the Commission, this Court granted certiorari on October 10, 1978 and consolidated the proceedings. (App. 39, 41.)

SUMMARY OF ARGUMENT

A lawful abandonment of a gas producer's certificated service obligation under the Natural Gas Act is not effected simply by the fact that production ceases from the reserves known to exist on the dedicated acreage. Section 7(b) of the Natural Gas Act unambiguously provides that no abandonment is authorized

[15] McCombs v. FPC, 542 F.2d 1144 (10th Cir. 1976).

[16] On April 4, 1978, the court denied petitions by United and the Commission for rehearing and suggestions for rehearing in banc. (Pet. App. 95.)

without the approval of the Commission after due hearing and a finding by the Commission that the abandonment meets specified statutory tests. Section 7(b) requires, *inter alia,* that the producer show and the Commission determine that the reserves on the dedicated acreage are depleted—not merely that existing wells have ceased to produce.

The decisions of this Court—particularly *Sunray Mid-Continent Oil Co.* v. *FPC*[17] and *California* v. *Southland Royalty Co.*[18]—make it clear that the Section 7(b) abandonment requirements constitute a key element in the scheme of regulation established by the Natural Gas Act and that a certificated service obligation cannot be terminated without Commission authorization pursuant to Section 7(b). If a lawful abandonment could be had by the fact that gas production ceases, it would undermine the authority of the Commission to determine whether the producer had done all that was required to maintain production and whether there were reserves on the dedicated acreage other than those which had ceased to produce.

In enacting the Natural Gas Policy Act of 1978, Congress made clear its understanding that the termination of production does not alone effect abandonment. Special provisions of that Act[19] exempt previously dedicated gas from further jurisdiction of the Commission under the Natural Gas Act if such gas was not being sold in interstate commerce on May 31, 1978 *and* on that date neither the person who dedicated the gas

[17] 364 U.S. 137 (1960).

[18] 436 U.S. 519 (1978).

[19] Natural Gas Policy Act of 1978, Pub. L. No. 95-621, §§ 2(18)(B)(iii), 601(a)(1)(A), 92 Stat. 3350 (1978).

to interstate commerce nor any successor in interest of that person had the right to sell the gas in question. This provision would be unnecessary if the termination of production alone effected abandonment under Section 7(b) of the Natural Gas Act.

Furthermore, the limited exclusion of the Natural Gas Policy Act of 1978 evidences Congress' clear intent that where, as here, a successor in interest of the person who originally dedicated the gas still holds the lease, the provisions of the Natural Gas Act, including Section 7(b), shall still apply. The Conference Reports accompanying the Natural Gas Policy Act of 1978 make that intent explicit stating that, where the successor in interest still has the right to produce the gas committed to interstate commerce by his predecessor in interest, "[t]he natural gas remains committed or dedicated to interstate commerce." [20]

The McCombs Group is in error in arguing that abandonment should be ordered retroactively as if it had been applied for and granted before the existence of new reserves was discovered. As in the case of the "*de facto* abandonment" theory adopted by the court below, this action would bypass the Section 7(b) requirements and undermine the Commission's authority with respect to certificated service obligations. Moreover, because a retroactive order is a corrective measure, it is not justified where, as here, the facts now known make it clear that the order sought to be entered would not be correct.

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[20] H.R. Conf. Rep. No. 95-1752, 95th Cong., 2d Sess. 72 (1978); S. Conf. Rep. No. 95-1126, 95th Cong., 2d Sess. 72 (1978). The two reports are identical. The Reports' full discussion of the exclusion is included in the appendix attached to this brief.

ARGUMENT

I. The Ruling of the Court Below Is in Conflict With the Plain Terms of Section 7(b) of the Natural Gas Act and With the Decisions of This Court.

A. Section 7(b) Unambiguously Requires a Commission Hearing, a Specified Finding and Commission Approval Before Certificated Natural Gas Service Can Be Abandoned.

The terms of the statute are plain. Section 7(b) of the Natural Gas Act provides without qualification that there shall be no abandonment without permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission as defined in that section.

B. The Decisions of this Court Confirm that Commission Approval Pursuant to Section 7(b) is a Mandatory Prerequisite to Abandonment.

This Court has consistently held that abandonment of certificated natural gas service can be effected only upon compliance with the provisions of Section 7(b). As early as its decision in *Atlantic Refining Co.* v. *Public Service Commission of New York,*[21] this Court held that once a gas supply is dedicated to interstate commerce, "there can be no withdrawal of that supply from continued interstate movement without Commission approval." [22] In *United Gas Pipe Line Co.* v. *FPC,*[23] this Court held that for abandonment, "[t]he statutory necessity of prior Commission approval, with its underlying findings, cannot be escaped." [24] In its

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[21] 360 U.S. 378 (1959).

[22] *Id.* at 389.

[23] 385 U.S. 83 (1966).

[24] *Id.* at 89.

recent decision in *Southland Royalty, supra,* the Court held:

> Once the gas commenced to flow into interstate commerce from the facilities used by the lessees, § 7(b) required that the Commission's permission be obtained prior to the discontinuance of 'any service rendered by means of such facilities."[25]

The reason for the Court's consistent adherence to this principle is clear. The Commission's authority to permit or withhold abandonment has always been recognized as a key element in the "comprehensive and effective regulatory scheme"[26] established by the Natural Gas Act. For example, in *Sunray Mid-Continent Oil Co.* v. *FPC, supra,* this Court held that the Commission was empowered to require producers to accept certificates of unlimited duration as a condition to their commencing to sell gas in interstate commerce. The Court reasoned that if natural gas companies were able to limit the duration of the service obligation they undertook, it would undermine the Commission's authority to control the terms of that service. It was essential for the Commission to be able to ensure that natural gas producers could not cease certificated service except on the terms provided in Section 7(b).

In *Sunray,* this Court addressed the very issue that has arisen in this case—the effect of the depletion of gas supply upon the Section 7(b) abandonment obligation of the holder of a certificate of unlimited duration:

> It might be observed that in these cases the Commission issued certificates without time limitations. *Thus if the companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under § 7(b). The Commission thus, even though there may be physical problems beyond its control, kept legal control over the continuation of service by the applicants.*[27]

The holding of the court below is in direct conflict with this conclusion.

Thus, the apparent depletion of reserves does not automatically effect a lawful abandonment. Instead, it is for the Commission to determine upon a proper showing—with opportunity for all interested parties, including the purchasers, to be heard—that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted or that the public convenience or necessity permits the abandonment. As the Court stated in *Sunray,* in discussing pipeline certificates:

> From the fact that the Commission has issued certificates in the presence of what may prove to be physical limitations on the service to be rendered under them, it does not follow that the Commission cannot take care lest these physical problems in the continuation of supply become further complicated by the legal certificate term limitations for which the petitioner contends.[28]

By the same token, the fact that all the gas reserves on the dedicated acreage will eventually be depleted does not justify bypassing the Commission's authority to determine whether abandonment is warranted at any given time. A producer, of course, operates under

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[25] 436 U.S. at 527.

[26] Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Indiana, 332 U.S. 507, 520 (1947).

[27] 364 U.S. at 158 n. 25 (emphasis added).

[28] *Id.* at 158 (footnote omitted). The omitted footnote is footnote 25 set out in the text above.

the same certificate and abandonment requirements and constraints as a pipeline; the producer can no more lawfully abandon service without meeting the Section 7(b) requirements than can a pipeline.

In *Southland Royalty, supra,* the Court held that abandonment authorization was necessary before deliveries of gas in interstate commerce could cease despite the expiration of the lease of the producer to whom the certificate had been issued. The decision emphasizes the importance attached by this Court to insuring that the Commission may "control both the terms on which a service is provided to the interstate market and the conditions on which it will cease." [29]

In short, this Court has made it clear that Section 7(b) is a key provision in the regulatory structure established by the Natural Gas Act, because it is Section 7(b) that assures that no certificated interstate natural gas service is abandoned without the Commis-

[29] 436 U.S. at 524. Other decisions of lower courts are in accord with this Court's in holding that Section 7(b) Commission approval is necessary for abandonment. *E.g.,* Reynolds Metals Co. v. FPC, 534 F.2d 379, 384-85 (D.C. Cir. 1976); Farmland Industries, Inc. v. Kansas-Nebraska Natural Gas Co., 349 F.Supp. 670, 677 (D. Neb. 1972), *aff'd,* 486 F.2d 315 (8th Cir. 1973); J. M. Huber Corp. v. FPC, 236 F.2d 550, 558 (3d Cir. 1956), *cert. denied,* 352 U.S. 971 (1957).

Of special relevance is Mitchell Energy Corp. v. FPC, 533 F.2d 258 (5th Cir. 1976), which held that gas from reservoirs not known to exist at the time of the original certificate was nevertheless dedicated to interstate commerce and subject to the Section 7(b) abandonment requirements. The decision below, in holding that the deeper reservoirs were not subject to the Section 7(b) abandonment requirements, is in conflict with *Mitchell Energy.* The fact that in *Mitchell Energy* the new production was discovered before the original production ceased, rather than afterwards, has no logical bearing on the question whether a Section 7(b) Commission proceeding is a prerequisite to release of the deeper reserves from commitment to interstate commerce.

sion's express approval.[30] Accordingly, this Court's decisions have made it clear that the Section 7(b) requirements are mandatory. The lower court's ruling, which holds to the contrary, is in conflict with these decisions.

II. The Decision Below Invades the Commission's Jurisdiction and Undermines the Commission's Authority to Administer the Natural Gas Act Effectively.

The court below held that the Section 7(b) requirements can be bypassed when the known facts make it appear that there is no more gas available from a particular tract. However, the statute expressly allocates to the Commission—not the courts—the responsibility to make the factual determination under which an abandonment will be permitted. As Judge Holloway pointed out in his dissent, the majority holding is "di-

[30] As noted in Sunray Mid-Continent Oil Co. v. FPC, 364 U.S. at 141-42, Section 7(b) of the Natural Gas Act "follows a common pattern in federal utility regulation." Section 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18), similarly provides that "no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment." Like the decisions under Section 7(b), the decisions under this provision uniformly hold that strict compliance with the statutory requirements is necessary to effect an abandonment and that only the Commission may in the first instance determine whether an abandonment is consistent with the present or future public convenience and necessity. Smith v. Hoboken R.R., Warehouse & S.S. Connecting Co., 328 U.S. 123, 129-30 (1946); Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 144-46 (1946); ICC v. Chicago, R.I. & Pac. R.R., 501 F.2d 908, 913-14 (8th Cir. 1974), *cert. denied,* 420 U.S. 972 (1975); Meyers v. Jay Street Connecting R.R., 259 F.2d 532, 536 (2d Cir. 1958); ICC v. Baltimore & A. R.R., 398 F.Supp. 454, 461 (D.Md. 1975), *aff'd,* 537 F.2d 77 (4th Cir.), *cert. denied,* 429 U.S. 859 (1976).

rectly contrary to the plain terms of § 7(b)." (App. 34.)

> It is the *Commission* that must make the required findings and give approval before abandonment is legally effected, and not private parties by their agreement on the facts as to depletion and their consent to discontinuation of service. Nor does the determination by another tribunal that abandonment has occurred, as a matter of law, satisfy § 7(b).[31]

The majority opinion of the court below undermines the Commission's authority to control the terms and conditions upon which gas producers may terminate certificated natural gas service. For in the view of the court below, the cessation of production from the known reserves on dedicated acreage would automatically result in an abandonment—and hence, the termination of the Commission's jurisdiction—without any finding or approval by the Commission. This would seriously impair the Commission's ability to carry out its statutory responsibility of assuring "an adequate and reliable supply of gas at reasonable prices." [32] The Commission would be left without the means to confirm that the producer did all that was required to maintain production from the old reserves. Similarly, the Commission would be denied the opportunity to determine how likely or unlikely was the possibility of production from the deeper horizons in light of geo-

[31] App. 35 (emphasis in original).

[32] California v. Southland Royalty Co., 436 U.S. at 523.

logical information available at the time production from the shallow reserves ceased.[33]

The majority opinion of the court below seems to assume that if an abandonment application had been brought after the old reservoirs ceased to produce but before the new production was established, the Commission would have been compelled to authorize abandonment. But this is not so. A similar situation was recently before the Commission in *Texaco, Inc., et al.*, FERC Docket Nos. G-8820, *et al.* There the Commission refused abandonment because the producer did not show that the lease had been explored to a point

[33] The court below quoted extensively (App. 27-29) from the opinion it had previously withdrawn. The excerpts quoted, although not part of the court's holding, contain the suggestion that abandonment was effected under Section 7(b) when the Secretary of the Commission sent certain letters to the producers. The letters themselves, which were never made part of the record, are set out in their entirety in the Appendix. (Pet. App. 97-98, 100-01.) These letters can in no way be construed as an authorization for abandonment. First, each of the letters expressly states that the producer must file an application and follow the Commission's other required procedures in order to obtain abandonment. Second, even if by some construction the letters could be viewed as authorizing abandonment, this would be entitled to no legal effect. It is well established that actions by the Secretary of the Commission are not binding; rather, only the institutional decisions of the agency —*i.e.*, decisions by a majority vote duly taken—are entitled to legal significance. Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 146 (1946) (action by Secretary of Interstate Commerce Commission not binding upon the Commission); Minneapolis & St. Louis R.R. v. Peoria & Pekin Union Ry. Co., 270 U.S. 580, 585 (1926) (action by Chairman of Interstate Commerce Commission not binding upon the Commission); Public Serv. Comm'n of New York v. FPC, 543 F.2d 757, 776-77 (D.C. Cir. 1974) (only institutional decisions of Federal Power Commission entitled to legal significance). Finally, the letters do not even approach fulfillment of the hearing and finding requirements of Section 7(b).

such that a definitive finding could be made that no additional gas reserves could be expected to be found through further exploratory efforts.[34] In holding that the cessation of production in and of itself effected abandonment, the court below would preclude the Commission from considering the possibility of production from deeper but untested reservoirs in making its determination under Section 7(b) whether "the available supply of natural gas is depleted."

Since the producers never sought Commission abandonment authorization here, the Commission never had the chance to make any evaluation whether the reserves were in fact exhausted or whether there might be additional reservoirs at lower depths. As the Administrative Law Judge noted in his Initial Decision (App. 15), there was "no assurance that abandonment, if applied for in 1966, would have been granted or unopposed." Indeed, because there now *is* production from deeper reservoirs, it is clear that the lease was *not* exhausted in 1966. It is indeed ironic that the court below relied heavily upon the assumption that the Commission would have been compelled to make a finding that is now known to be incorrect.

In any event, Section 7 (b) expressly charges the *Commission* with the responsibility of determining whether "the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted." By making its own finding on abandonment, the court below not only impermissibly usurped the Commission's responsibility expressly conferred under Section 7(b), but it also exceeded the

[34] Order Granting Petition for Reconsideration and Modifying Prior Order, issued November 1, 1977, mimeo at 3.

bounds of its reviewing authority under Section 19(b) of the Act.[35]

If allowed to stand, the decision of the court below would create considerable uncertainty as to whether abandonment of particular acreage has occurred or not. Abandonment would not be dependent upon a Commission order—a readily identifiable point of reference—but upon the actual or assumed depletion of the dedicated reserves. It would often be unclear whether a particular set of facts resulted in abandonment. For example, the court below emphasized the five-year period that had elapsed between the date of the last production from the shallow reserves and the new production from the deeper horizons. If this is a factor, it introduces an additional element of uncertainty, since it is unclear how long the interval must be before the abandonment is effected.

Moreover, the lower court's decision deprives other parties (*e.g.,* pipeline purchasers and gas consumers) of the right to be heard in determining whether abandonment should be granted. Indeed, the power to effect abandonment would be to a large extent within the control of the producer. This is contrary to the mandate of Section 7(b) and the decisions of this Court.

[35] FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331-34 (1976). This decision shows the limitations on the role of the reviewing court under Section 19(b) of the Natural Gas Act. If the court believes that the Commission's decision is not sustainable on the record, it may vacate it and remand the case for additional consideration. For a court to go beyond this, however, and to engage in its own fact-finding constitutes an abuse of its reviewing authority and an attempt by the court "to exercise an essentially administrative function" within the domain Congress has set aside exclusively for the agency. *Id.* at 333-34. *See also,* FPC v. Idaho Power Co., 344 U.S. 17, 21 (1952); SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

III. The Natural Gas Policy Act of 1978 Shows A Clear Congressional Understanding and Intent That The Category of Gas Involved Here Is and Shall Remain Subject To The Requirements of Section 7(b) Of The Natural Gas Act.

In enacting the Natural Gas Policy Act of 1978 (the "NGPA"),[36] Congress evidenced its clear understanding that mere cessation of production from dedicated acreage does not effect an abandonment under Section 7(b) of the Natural Gas Act. Moreover, Congress manifested an intent that where, as here, the successors in interest to the person who originally dedicated the gas to interstate commerce still control the lease, the gas shall remain fully subject to the requirements of Section 7(b) of the Natural Gas Act.

Section 601(a)(1)(A) [37] of the NGPA affirmatively removes from the jurisdiction of the Commission under the Natural Gas Act that gas which was not "committed or dedicated to interstate commerce" on the day before the date of enactment of the NGPA, *i.e.*, on November 8, 1978. The term "committed or dedicated to interstate commerce" is defined generally in Section 2(18) [38] of the NGPA as any gas which would be required to be sold in interstate commerce under the terms of any contract, any certificate under the Natural Gas Act, or any provision of the Act. However, the definition excludes gas which was not being sold in interstate commerce on May 31, 1978 if on that date neither the person who caused the gas to be dedicated to inter-

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[36] Pub. L. No. 95-621, 92 Stat. 3350 (1978).

[37] *Id.* § 601(a)(1)(A). The full text of this provision is set out in the appendix to this brief at p. 4a.

[38] *Id.* § 2(18). The full text of this provision appears in the appendix to this brief at pp. 2a-3a.

state commerce nor any successor in interest to that person had any right explore for, develop, produce or sell such natural gas.[39] Thus, if sales in interstate commerce from particular dedicated acreage had ceased prior to May 31, 1978 and if the lease had reverted to the landowner by that date, future gas production from the acreage will not be subject to the Natural Gas Act.[40]

This exclusion from the definition would have little or no meaning if the result reached by the court below were correct. If abandonment were effected upon termination of production from known reserves, future gas production from that acreage would be free from the requirements of the Natural Gas Act without the new statutory enactment.

Moreover, in enacting the NGPA, Congress made clear a positive intent that gas previously certificated *shall* remain subject to the Natural Gas Act if either (a) the gas was being sold in interstate commerce on May 31, 1978, or (b) the person who caused the gas to be dedicated to interstate commerce or any successor in interest to that person had any right to explore for, develop, produce or sell such gas on May 31, 1978. Since the owners of the Butler B leasehold interest, *e.g.*, the McCombs Group, are the successors in interest of the person who originally dedicated the gas, Bee Quin, the Butler B lease does not fall within the exclusion of the

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[39] *Id.* § 2(18)(B)(iii).

[40] The Conference Reports accompanying the NGPA state that the purpose of the exclusion is to limit the extension of this Court's decision in *Southland Royalty, supra,* but that *Southland* is not reversed on its facts. H.R. Rep. No. 95-1752, 95th Cong., 2d Sess. 71-72 (1978); S. Rep. No. 95-1126, 95th Cong., 2d Sess. 71-72 (1978). The full text of the pertinent portion of the reports appears in the appendix to this brief at pp. 4a-7a.

definition of gas "committed or dedicated to interstate commerce." Instead, it falls within that category of gas which Congress clearly intended should remain subject to the Natural Gas Act.

The evidence of this Congressional intent is not mere inference from the limitation on the exclusion from the NGPA definition, although that in itself is clear enough. Congress made its intent explicit in its Conference Reports accompanying the NGPA where it explained the effect of Section 2(18)(B)(iii):

> Several examples may be helpful. Seller A commits natural gas to interstate commerce in 1950. On May 31, 1978, Seller B, Seller A's successor in interest, has the right to explore for, develop, produce, or sell such natural gas. *The natural gas remains committed or dedicated to interstate commerce.*[41]

Thus, Congress was clear and explicit in indicating its intent that gas such as that involved here shall remain subject to the Natural Gas Act.

The statement in the Conference Report is no mere advisory opinion by a Congress that had nothing to do with the enactments that define the scope of the Natural Gas Act. In the Natural Gas Policy Act of 1978, Congress had under consideration the questions raised by this Court's decision in *Southland Royalty* and the extent to which producers' prior dedications to interstate commerce should be terminated or continued. Sections 2(18)(B)(iii) and 601(a)(1)(A) of the NGPA represent a considered determination by Congress of the extent to which gas previously dedicated to interstate commerce should remain subject to the provisions of the Natural Gas Act. Accordingly, the views of the 95th Congress are entitled to the weight normally accorded the expression of intent of the Congress enacting the controlling provision of law.[42]

[41] H.R. Rep. No. 95-1752, 95th Cong., 2d Sess. 72 (1978); S. Rep. No. 95-1126, 95th Cong., 2d Sess. 72 (1978) (emphasis added).

IV. A *Nunc Pro Tunc* Abandonment Order Would Be Erroneous Because It Would Bypass The Requirements of Section 7(b) Of The Natural Gas Act and Because It Would Be Contrary To The Facts Of This Case.

In the proceedings before the Commission the McCombs Group asked that abandonment of the Butler B reserves be ordered *nunc pro tunc* as of 1966.[43] The Commission correctly refused to do so in light of the fact that the reserves were not depleted.[44] In its oppo-

[42] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969); Glidden Co. v. Zdanok, 370 U.S. 530, 541 (1962).

[43] The McCombs Group's request for *nunc pro tunc* abandonment must be interpreted as merely a request for retroactive abandonment rather than for application of the judicial doctrine of *nunc pro tunc*. The *nunc pro tunc* doctrine permits courts to enter orders having retroactive effect for the limited purpose of correcting a previously entered order which contained an error, omission, or a mistake. Gagnon v. United States, 193 U.S. 442 (1904); Brignardello v. Gray, 1 Wall. 627 (1864); Matthies v. Railroad Retirement Board, 341 F.2d 243 (8th Cir. 1965); W. F. Sevell Co. v. Hessee, 214 F.2d 459 (10th Cir. 1954).

[44] The McCombs Group's argument for retroactive abandonment depends upon the contention that if abandonment had been sought in 1966, it would have been routinely granted. But this is by no means clear. As stated by the Presiding Administrative Law Judge in his Initial Decision (App. 15):

> Respondents argue that the Commission should do now what should have been done in 1966, and authorize abandonment *nunc pro tunc*. There is no assurance that abandonment, if applied for in 1966, would have been granted or even unopposed. In any event, it is now clear that the deeper reserves

sition to certiorari the McCombs Group construed the Court of Appeals decision as a holding that the Commission had erred as a matter of law in failing to authorize the abandonment retroactively.[45]

The McCombs Group is incorrect in arguing that it is permissible to side-step the requirements of Section 7(b) of the Natural Gas Act by characterizing the decision of the court below as a direction to the Commission to enter an order *nunc pro tunc* authorizing abandonment as of 1966. This action would have exactly the same effect as the *de facto* abandonment theory of the court below and would be subject to the same objections. In either case the Commission would be deprived of exercising its Section 7(b) authority and the other parties would be deprived of their right to be heard on the issue of abandonment.

The power of administrative agencies to enter orders having retroactive effect is one that is to be sparingly invoked [46] and used only when the result is consistent with the statutory design intended by Congress.[47] Here

underlying the Butler B tract were not depleted (there was no evidence either way in 1966).

The Judge was sustained by the Commission in Opinion No. 740. (Pet. App. 31 n. 25.)

[45] The basis of the McCombs Group's opposition to certiorari was the argument that the decision of the court below should be read as having corrected the producers' "good faith" failure to file an abandonment application by directing the Commission to enter an abandonment order *nunc pro tunc* on the ground that the facts as they appeared in 1966 would have justified the Commission in entering such an order at that time.

[46] Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 160 (D.C. Cir. 1967).

[47] SEC v. Chenery Corp., 332 U.S. 194 (1947).

a *nunc pro tunc* abandonment would undermine Congress' purpose in creating a "comprehensive and effective regulatory scheme" [48] for interstate natural gas sales by circumventing the Commission's authority to control the abandonment of dedicated reserves. Any effort to insulate the McCombs Group from the effects of the failure of their predecessors in interest to file for abandonment must be rejected in order to avoid "the mischief of producing a result which is contrary to a statutory design . . . ." [49] Indeed, a retroactive abandonment here would have the effect of placing the burden for failure to comply with the Section 7(b) requirements, not upon the producers who omitted to invoke them, but upon the interstate consumers for whose protection they were enacted.

The cases cited by the McCombs Group are not in point. In *Plaquemines Oil & Gas Co.* v. *FPC* [50] and *Niagara Mohawk Power Corp.* v. *FPC* [51] the regulated pipeline and power plants had failed to apply for the certificates and licenses required by the Natural Gas Act and Federal Power Act, respectively, even though the Commission had asserted jurisdiction over the parties several years earlier. In both cases the Commission applied the relevant regulatory standards to the noncomplying party from the date of the Commission's assertion of jurisdiction as if the party had properly sought the Commission's approval of its actions at that time.

[48] Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Indiana, 332 U.S. 507, 520 (1947).

[49] SEC v. Chenery Corp., 332 U.S. at 203.

[50] 450 F.2d 1334 (D.C. Cir. 1971).

[51] 379 F.2d 153 (D.C. Cir. 1967).

In both *Plaquemines* and *Niagara Mohawk,* the action which the Commission implied on the part of the regulated parties was the act of submitting to the jurisdiction of the Commission, since this was essential to the effective operation of the regulatory scheme created by Congress. Had the Commission not applied the Acts retroactively as if the parties had acted in compliance with the mandates of Congress, the regulatory scheme would have been thwarted. In contrast, the retroactive application of Section 7(b) sought here would terminate the Commission's jurisdiction and, in so doing, frustrate the purposes of the Act.

The final case relied upon by the McCombs Group as authorizing the retroactive application of the Act adds no further support to their argument. In *Highland Resources, Inc.* v. *FPC,*[52] the court determined that Highland's failure to make the proper filing was due to its reliance on the published standards of the Commission concerning what action was required of producers in its situation. In light of these circumstances, the court held that the Commission should give retroactive effect to Highland's application to avoid an inequitable result.

Quite the opposite situation is presented in the instant case. On two occasions following the termination of production from the Butler B lease, the Secretary of the Commission sent letters to the McCombs Group's predecessors informing them that if no further sales of gas were contemplated it would be necessary to file applications for abandonment.[53] Although invited to do

[52] 537 F.2d 1336 (5th Cir. 1976).

[53] (Pet. App. 97, 100.) The August 1968 and January 1971 letters from the Commission are not part of the record. They were, however, considered in the decision of the court below. (App. 28-29.)

so, the producers chose not to file for abandonment. *Highland Resources* is therefore inapposite to the McCombs Group's request for retroactive application of the Act.

Moreover, all three cases cited by the McCombs Group involve situations where the action given retroactive effect was correct in the light of facts as they appeared at the later date. This is not true here. Abandonment authorization would not be appropriate unless the Court ignores the fact that the reserves on the Butler B lease are not exhausted. The retroactive entry of an order known to be erroneous is not justified on the supposition that the order would have been entered at some past date because the true situation was not then known.

CONCLUSION

For the reasons stated above, the decision of the court below should be reversed and the case remanded with directions (i) to affirm the Commission's determination that the gas from the Butler B lease is dedicated to interstate commerce and (ii) to dispose of the remaining issues in the appeal in accordance with that principle.

Respectfully submitted,

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November 24, 1978

APPENDIX

Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b) (1976):

(b) *Review of Commission order*

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court

such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

Section 2(18) of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, § 2(18), 92 Stat. 3350 (1978):

SEC. 2. DEFINITIONS.

For purposes of this Act—

. . . .

(18) *Committed or Dedicated to Interstate Commerce.*—

(A) *General Rule.*—The term "committed or dedicate to interstate commerce", when used with respect to natural gas, means—

(i) natural gas which is from the Outer Continental Shelf; and

(ii) natural gas which, if sold, would be required to be sold in interstate commerce (within the meaning of the Natural Gas Act) under the terms of any contract, any certificate under the Natural Gas Act, or any provision of such Act.

(B) *Exclusion.*—Such term does not apply with respect to—

(i) natural gas sold in interstate commerce (within the meaning of the Natural Gas Act)—

(I) under section 6 of the Emergency Natural Gas Act of 1977;

(II) under any limited term certificate, granted pursuant to section 7 of the Natural Gas Act, which contains a pregrant of abandonment of service for such natural gas;

(III) under any emergency regulation under the second proviso of section 7(c) of the Natural Gas Act; or

(IV) to the user by the producer and transported under any certificate, granted pursuant to section 7(c) of the Natural Gas Act, if such certificate was specifically granted for the transportation of that natural gas for such user;

(ii) natural gas for which abandonment of service was granted before the date of enactment of this Act under section 7 of the Natural Gas Act; and

(iii) natural gas which, but for this clause, would be committed or dedicated to interstate commerce under subparagraph (A)(ii) by reason of the action of any person (including any successor in interest thereof, other than by means of any reversion of a leasehold interest), if on May 31, 1978—

(I) neither that person, nor any affiliate thereof, had any right to explore for, develop, produce, or sell such natural gas; and

(II) such natural gas was not being sold in interstate commerce (within the meaning of the Natural Gas Act) for resale (other than any sale described in clause (i)(I), (II), or (III)).

Section 601(a)(1)(A) of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, § 601(a)(1)(A), 92 Stat. 3350 (1978):

SEC. 601. COORDINATION WITH THE NATURAL GAS ACT.

(a) *Jurisdiction of the Commission Under the Natural Gas Act.*—

(1) *Sales.*—

(A) *Natural gas not committed or dedicated.*—For purposes of section 1(b) of the Natural Gas Act, effective on the first day of the first month beginning after the date of the enactment of this Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to natural gas which was not committed or dedicated to interstate commerce as of the day before the date of the enactment of this Act solely by reason of any first sale of such natural gas.

Excerpt from House and Senate Conference Reports* on the Natural Gas Policy Act of 1978. H. R. Conf. Rep. No. 95-1752, 95th Cong., 2d Sess. 71-72 (1978); S. Conf. Rep. No. 95-1126, 95th Cong., 2d Sess. 71-72 (1978):

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE ON CONFERENCE

. . . .

Committed or dedicated to interstate commerce

The term committed or dedicated to interstate commerce, for purposes of this Act, means natural gas sold from the Outer Continental Shelf and most natural gas which, if sold, would be required to be sold in interstate commerce within the meaning of the Natural Gas Act. The definition is intended by the conferees to clarify any uncertainty re-

*The conference reports for the House and the Senate are identical.

sulting from recent court decisions as to what natural gas may qualify under what price categories in Title I of this Act, and what natural gas may qualify for non-price deregulation in Title VI of this Act.

The term does not apply to:

(A) natural gas sold in interstate commerce—

(1) under sec. 6 of the Emergency Natural Gas Act of 1977;

(2) under a limited term certificate with a pregrant of abandonment of service pursuant to sec. 7 of the Natural Gas Act;

(3) under any emergency sale pursuant to sec. 7(c) of the Natural Gas Act; and

(4) to the user by the seller and transported under a certificate granted pursuant to sec. 7(c) of the Natural Gas Act;

(B) natural gas for which abandonment of service was granted on or before the date of enactment under sec. 7 of the Natural Gas Act; and

(C) natural gas which would be committed or dedicated pursuant to the above criteria by reason of the action of any person (including any successor in interest thereof, other than by means of any reversion of a leasehold interest), if on May 31, 1978—

(1) neither that person, nor any affiliate thereof, had any right to explore for, develop, produce, or sell such natural gas; and

(2) such natural gas was not being sold in interstate commerce (within the meaning of the Natural Gas Act) for resale (other than any sale described in (A) (1), (2), or (3) above).

The conferees intend that the term "successor in interest" shall exclude any interest owner who acquires his right pursuant to the reversion or any other termination of a natural gas leasehold interest, or any subsequent grantee of such interest owner who acquires his interest after the date of such reversion or other termination.

The exclusion described in paragraph (C) above limits further extension of the holding of the Supreme Court in *California et al.* v. *Southland Royalty Co. et al.* (Slip Opinion No. 76-1114, decided May 31, 1978). The case is not, however, reversed on its facts.

Under the exclusion, certain natural gas is not to be considered committed or dedicated, if such natural gas is committed or dedicated by reason of the action of any person and neither that person (or any successor in interest thereof) nor any affiliate, on May 31, 1978, had any right to explore for, develop, produce, or sell such natural gas. If the right to explore is vested in any other person by means of any reversion of a leasehold, such other person is not to be considered a successor in interest, and thus the natural gas would not be considered committed or dedicated, unless the gas is also sold in interstate commerce (within the meaning of the Natural Gas Act) for resale on May 31, 1978.

Several examples may be helpful. Seller A commits natural gas to interstate commerce in 1950. On May 31, 1978, Seller B, Seller A's successor in interest, has the right to explore for, develop, produce, or sell such natural gas. The natural gas remains committed or dedicated to interstate commerce.

Seller C is a lessee, who commits natural gas under a leasehold interest to interstate commerce in 1950. In 1971, the lease reverts to Seller D, and Seller D terminates the sales in interstate commerce. No natural gas from the lease is sold in interstate commerce for resale on May 31, 1978. Such natural gas is excluded from the definition of committed or dedicated. However, if Seller D had sold such

natural gas in interstate commerce for resale on May 31, 1978, such natural gas would be committed or dedicated under the definition.

With respect to natural gas from the Outer Continental Shelf that is not subject to a certificate of public convenience and necessity under the Natural Gas Act on the date of enactment, the term "committed or dedicated to interstate commerce" is used solely for the purpose of the pricing and other provisions of this Act. This definition does not create new freestanding obligations or expand the jurisdiction of the Commission under the Natural Gas Act.

In the Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-17, 78-249

UNITED GAS PIPE LINE COMPANY and THE FEDERAL ENERGY REGULATORY COMMISSION,
Petitioners,

VERSUS

BILLY J. McCOMBS, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENTS BILLY J. McCOMBS, ET AL.

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BRIEF OF RESPONDENTS BILLY J. McCOMBS, ET AL.

Respondents, Billy J. McCombs, R. J. Stillings, d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corp. and Bill Forney ("McCombs") in this brief respond to briefs which have been filed by United Gas Pipe Line Company ("United") and the Federal Energy Regulatory Commission ("Commission").

I.
QUESTIONS PRESENTED

The question is *not* one of primary jurisdiction of the Commission to determine abandonment of service under Section 7(b) of the Natural Gas Act, as contended by United. To the contrary, this proceeding originated in a proceeding before the Commission and the Commission has exercised its jurisdiction. Nor is the question whether a court of appeals may independently determine whether service has been abandoned, as contended by the Commission. The court of appeals made no such determination.

What the court of appeals did determine was that the Commission erred in failing to apply the Act retroactively to reflect compliance therewith where McCombs' predecessor in good faith failed to file abandonment papers, where McCombs was innocent of that failure, and where abandonment would have been routinely granted had the proper papers been filed at the proper time. Hence, the question presented is whether the court of appeals correctly decided this issue.

There is further presented the additional question of whether McCombs' gas reserves ever fell within the ambit of a "service rendered" under Section 7(b) of the Natural Gas Act in the first place, so as to require abandonment permission.

II.
STATEMENT OF THE CASE

The following statement is submitted inasmuch as both the Commission's and United's statement of the case omit certain facts deemed relevant by McCombs.

A. PROCEEDINGS BELOW.

On October 9, 1973, United filed a complaint in this matter with the Commission, alleging that McCombs is required to deliver production from a certain oil and gas lease, located in Karnes County, Texas (the "Butler B Lease") to United under Section 7 of the Natural Gas Act, 15 U.S.C. Sec. 717, *et seq.* (1976). Hearings were held before the Commission on January 10, and February 13 and 14, 1974. The Administrative Law Judge issued his initial decision on April 26, 1974, finding that "however innocent" McCombs may have been and "however negligent United may have been in asserting its rights" (App. 16A), McCombs was required to cease delivering gas from the Butler B Lease to E. I. du Pont de Nemours & Company ("du Pont") in intrastate commerce, and to commence delivering that gas to United in interstate commerce. The Judge refused McCombs' request to authorize abandonment as of 1966, as if the proper papers had been filed then (App. 15A), which refusal was duly put before the Commission on exceptions (Pet. App. 15, 21).

On August 20, 1975, the Commission issued Opinion No. 740, holding, *inter alia*,

> "Whatever action the Commission may have taken under [Section 7(b)] from the time production ceased

in 1966 until it was resumed in 1971, it cannot consider abandonment or abandonment *nunc pro tunc* where the supply of natural gas is not depleted." (Pet. App., 31)

On judicial review, the court below held that the Commission erred in this respect:

"In the light of the facts and circumstances contained and reflected in this record, we hold that the Commission erred in concluding that the cessation of gas production on May 28, 1966, did not constitute an abandonment under Section 7(b) of the Natural Gas Act." (App. 29a)

B. THE BUTLER B LEASE AND THE 1953 CONTRACT.

In 1948, B. C. Butler, Sr., *et al.*, Lessors, executed the Butler B Lease in favor of W. R. Quin, Lessee, covering 163 acres of land in Karnes County, Texas (Ex. 19). In 1953, Mr. Quin's widow, Bee Quin, entered into a gas purchase contract (the "1953 Contract") with United covering the sale of gas well gas from the Butler B Lease (Ex. 1). In 1954, the Commission granted certificates of public convenience and necessity to Bee Quin. The Butler B Lease was thereafter transferred several times, and in March of 1966 came to rest in the hands of Louis H. Haring, *et al.* ("Haring").

At the time of that acquisition, there was one shallow (2,900 feet) well located on the Butler B Lease, but it was not producing (R. 201). Haring unsuccessfully attempted to establish production from this well, during which process a small amount of gas was obtained. All production from this well ceased on May 28, 1966 (R. 201, 202).

United and Haring exchanged correspondence reflecting that there would be no more gas available (R. 402-404; 574-579). United then removed its measuring equipment, and Haring testified that he considered the 1953 Contract to be at an end (R. 202). Although the term of the Butler B Lease was only for so long as production therefrom continued, the lease did not terminate because Haring drilled an oil well on the Butler B Lease, the production from which perpetuated the lease (R. 202).

Haring, a petroleum geologist, testified, "Certainly I was not aware of the gas reserves at deeper levels when the gas production ceased in 1966, and, so far as I know, neither United nor anyone else was aware of its existence" (R. 202).

By letters dated August 8, 1968, and January 13, 1971, the Commission invited Haring to file an abandonment application and a notice of cancellation of the rate schedule.[1] Because production had ceased, and because he was unaware of other production and he considered the 1953 Contract to have been ended, Haring testified that he and his counsel thought it unnecessary to file these papers (R. 209, 211). Until the hearing in this proceeding, McCombs did not know that Haring had not obtained abandonment permission (R. 266).

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[1] Petitioners stated in their briefs that these letters are not a part of the record. To the contrary, these letters were a part of Docket No. G-12694, which the Commission officially noticed in Opinion No. 740 (Pet. App. 30). They are also a part of the record in the court of appeals, being attached to the Commission's motion for rehearing of the court's first opinion.

C. McCOMBS.

There were no further developments concerning the Butler B Lease until 1970 or 1971, when Bill Forney, operator for McCombs, became interested in the possibility of deeper reserves in the area. Forney entered into a contract with Haring which provided that Haring would assign Forney certain deep levels of the Butler B Lease in exchange for the drilling of a well (R. 514-529).

Mr. Forney obtained from Haring a title opinion dated March 6, 1967 covering the Butler B Lease (R. 555-561). This title opinion makes no reference to the 1953 Contract.

Mr. Forney commenced the drilling of the Butler No. 1 Well on August 27, 1971 (R. 253). He testified that at this time, in reliance on the 1967 title opinion, he believed his title to be clear (R. 253). This well was completed as a producer of gas from two deep zones (between 8,000 and 9,000 feet) and earned an assignment from Haring of certain deep levels of the Butler B Lease (R. 254).

After the completion of the Butler No. 1 Well, McCombs began to contact purchasers concerning the gas. United was the first purchaser contacted. Although other purchasers were also contacted, negotiations did not proceed to any great extent with them (R. 254). United made four written offers for a contract, the first in November of 1971, and did not claim any rights under the 1953 Contract or the Natural Gas Act (R. 93, 244, 406, 555-561, 580-583, 584-622). United's best offer was 35¢ per Mcf for the first fourteen months, and a lower rate thereafter. As this was not satisfactory, negotiations were broken off with United, and the producers sought another market (R. 261).

McCombs then entered into negotiations with du Pont resulting in a letter agreement dated April 12, 1972, with Lo Vaca Gas Gathering Company under which temporary deliveries were commenced on May 12, 1972, and culminating in a contract dated June 1, 1972, with du Pont (R. 623-626, 627-660). The contract provided for the same initial rate as United's offer, but with more satisfactory escalation provisions. Prior to April 12, 1972, United was aware that McCombs intended to sell the gas to an intrastate purchaser, but failed to assert any rights under the 1953 Contract (R. 263).

Mr. Forney obtained a title opinion dated December 7, 1971, which made a requirement related to the 1953 Contract (R. 567-573). Prior to obtaining this title opinion, Mr. Forney had no actual knowledge of the 1953 Contract (R. 257), nor did any of the other working interest owners (R. 319, 324, 327, 330). Upon receiving the title opinion, Mr. Forney contacted Haring, who indicated that he had a letter in his files releasing the gas contract (R. 257).

A supplemental division order title opinion dated May 31, 1972 (R. 668-673) did not bring forward the requirement concerning the 1953 Contract. Mr. Forney was satisfied with the form of the opinion, because he thought Haring had in his possession a letter which released the contract (R. 264).

Although Mr. Forney requested Haring to furnish a copy of the letter when he contacted him after receiving the first title opinion, it was not ultimately forthcoming until sometime after June 6, 1973 (R. 258). When it was furnished, it appeared that it was the correspondence with

United at the time of depletion of reserves in 1966 referred to above (R. 574-579).

D. UNITED ASSERTS ITS CLAIM.

On June 6, 1973, more than one year after deliveries had commenced to du Pont and more than a year and a half after United first offered to purchase the gas, United first claimed the right to purchase McCombs' gas from the Butler B Lease under the 1953 Contract (R. 764-765). On August 2, 1973, McCombs filed suit for declaratory judgment that the 1953 Contract was void, and for other relief. United counterclaimed for damages. That case is styled *Billy J. McCombs, et al.* v. *United Gas Pipe Line Company, et al.*, No. SA-73-CA-210 in the United States District Court for the Western District of Texas at Austin. Although discovery and pre-trial procedures in that case have been substantially completed, the case is presently being held in abeyance pursuant to the agreement of counsel, pending completion of the instant litigation.

III.
SUMMARY OF ARGUMENT

(i) The court of appeals properly held that the Commission erred in denying McCombs' request to apply the Act retroactively as if Haring had complied with it at the time of the depletion of his reserves in 1966. The court recognized that Haring's failure to file was in good faith. The court observed that in 1966 Haring's reserves were definitely and totally depleted, despite his diligent efforts to restore production. This fact was recognized by both the

seller and the buyer, and was contrary to their wishes. No one knew of any other reserves. Haring believed the 1953 Contract to be at an end, and therefore did not inform McCombs of it. McCombs was totally innocent. The court further observed that there are no opinions dealing with similar factual situations.

Where a party is in good faith in failing to file, the courts have uniformly required the Commission to apply the Act retroactively to reflect compliance, *i.e.*, as if the papers had been filed at the *proper time*. In the instant case, the Commission was similarly asked to apply the Act retroactively as of 1966. In the light of the evidence existing *at that time*, the court of appeals properly held that the Commission's failure to do so was erroneous.

The court held that the Commission erred as a matter of law, as opposed to a matter of fact. That is, the error committed was not as to a factual issue within the expertise of the Commission. Instead, the Commission's error consisted of considering the wrong evidence in refusing to apply the Act retroactively. The Commission disregarded the only evidence in the record concerning the facts as they existed in 1966, when the papers should have been filed, and applied the evidence as it existed in 1975, when it issued its opinion. *The only* evidence concerning the facts existing in 1966 was the testimony of Haring, a petroleum geologist, that he had failed after diligent efforts to restore production and that neither he nor United nor anyone else knew of any other reserves. Since the Commission could have reached but one conclusion based on this evidence, the court deemed it unnecessary to remand to the Commission to enter an order accordingly.

This proper retroactive application of the Act would not deprive the Commission of exercising its Section 7(b) authority, nor deprive interested parties of the right to be heard on the issue of abandonment, as argued by the Commission and United. In this case, the Commission was not *deprived* of its Section 7(b) authority, but rather was asked to *exercise* that authority by retroactively applying the Act on the basis of the record in the instant case. Further, no interested party has been deprived of the right to be heard on the issue of abandonment because that issue was one of the issues which was actually tried before the Administrative Law Judge in this case. All interested parties had notice of this proceeding and an opportunity to be heard, and United and the Commission in fact participated. Yet, the only evidence adduced as to the facts as they existed in 1966 was the testimony of Haring that no one knew of any other reserves at that time.

(ii) McCombs' gas reserves are not within the prohibition of Section 7(b) of the Natural Gas Act. Section 7(b) applies to any *service rendered* by means of jurisdictional facilities. The Commission and United argue that the court of appeals erred because the provisions of Section 7(b) of the Act were not complied with. The premise of this argument is that Section 7(b) is applicable not only to Haring's shallow reserves from which there was a "service rendered" but also to McCombs' deep reserves from which there was no "service rendered." This premise is in error.

The legislative history of Section 7(b) and the decided cases firmly establish that the words "service rendered"

are to be given their plain meaning, *i.e.*, "service" is "rendered" when reserves of natural gas are physically delivered in interstate commerce. This is so because the purpose of Section 7(b) is to require the continuation of deliveries of natural gas in interstate commerce once those deliveries have commenced and the public has thereby relied upon the reserves supporting those deliveries. Once deliveries have been commenced and the public has thereby relied on the reserves supporting those deliveries ". . . there can be no withdrawal of that supply from continued interstate movement without the Commission's approval." *State of California* v. *Southland Royalty Company*, 46 U.S.L.W. 4539, 4540 (1978); *Sunray Mid-Continent Oil Company* v. *FPC*, 364 U.S. 137, 156 (1960); *Atlantic Refining Company* v. *Public Service Commission*, 360 U.S. 378, 389 (1959).

The fact that gas reserves may be covered by a certificate, a contract, or an oil and gas lease creates no Federal statutory obligation under Section 7(b) to commence initial deliveries or to continue those deliveries once commenced. That statutory obligation is found only in Section 7(b), which is invoked only by the commencement of deliveries.

Thus, once Haring had commenced deliveries from his reserves, he was required to continue ". . . down to the exhaustion of the reserve . . ." (*Hunt* v. *FPC*, 306 F.2d 334, 342 (5th Cir. 1962)) and ". . . so long as production continues. . . ." *Harper Oil Company* v. *FPC*, 284 F.2d 137, 139 (10th Cir. 1960). McCombs' reserves, however, were discovered more than five years after Haring's were depleted and lie at depths more than a mile greater than those of

Haring. No reliance has been placed on McCombs' reserves, and McCombs has never commenced deliveries from them in interstate commerce. No Federal statutory obligation to continue deliveries has therefore attached to McCombs' reserves.

United's right to purchase reserves upon which no reliance has been placed rests, not on Federal law, but upon the enforceability of the 1953 Contract under state law. This issue is pending before the district court in the Austin litigation. If McCombs is unsuccessful in this litigation, then McCombs must commence deliveries to United from his reserves, the public will rely thereon, and the Federal statutory obligation under Section 7(b) will then attach.

(iii) The Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (1978), has little relevance to this case. The fact that McCombs' reserves are not within one of the statutory *exclusions* to the definition of "committed or dedicated to interstate commerce" contained in that Act is meaningless, because McCombs' reserves are not within the definition itself. Further, it is difficult to see how any manifestations of intent by the 95th Congress which enacted the Natural Gas Policy Act of 1978 can shed light on the intent of the 75th Congress which enacted the Natural Gas Act in 1938, or what relevance the intent of the 95th Congress would have to this case if it were attributed to the 75th Congress.

IV.
ARGUMENT

A. THE COURT OF APPEALS PROPERLY HELD THAT THE COMMISSION ERRED IN FAILING RETROACTIVELY TO APPLY THE NATURAL GAS ACT.

1. **Introduction.** The court of appeals properly viewed this case as one dealing with the consequences of Haring's failure to file the proper papers with the Commission at the proper time.

The court recognized that Haring's failure to do so was in good faith. He was without the benefit of definitive legal precedents. The court observed, "[w]e know of no opinion dealing with a factual situation similar to that presented here" (App. 29a). The court further observed that in 1966 Haring's reserves were definitely and totally depleted, despite his diligent efforts to restore production (App. 27a). This fact was recognized by both the seller and buyer and was contrary to their wishes (App, 27a). No one knew of any other reserves (App. 28a). Haring believed the 1953 Contract to be at an end (App. 25a). He therefore did not inform McCombs of its existence (App. 25a). McCombs was totally innocent.

In view of these facts, the court held that the Commission erred in denying McCombs' request to apply the Act retroactively as if Haring had complied with it in 1966 (App. 29a). The decided cases demonstrate that this holding was proper.

2. **Good Faith Failures to File.** The courts have addressed the consequences of a good faith failure of the

proper party to file the proper papers with the Commission at the proper time in four cases. In *Plaquemines Oil and Gas Company* v. *FPC*, 450 F.2d 1334 (D.C. Cir. 1971) and *Highland Resources, Inc.* v. *FPC*, 537 F.2d 1336 (5th Cir. 1976), the party had failed to file in good faith and the court required a retroactive application of the Act, as if the party had complied at the time required. In *Borough of Ellwood City* v. *FERC*, 583 F.2d 642 (3rd Cir. 1978) and *Niagara Mohawk Power Corporation* v. *FPC*, 379 F.2d 153 (D.C. Cir. 1967), the Commission itself retroactively applied the Act as if the party had applied at the required time.

The *Ellwood* case arose out of this Court's holding in the *Colton* case, *FPC* v. *Southern California Edison Co.*, 376 U.S. 205 (1964). In the *Ellwood* case, Pennsylvania Power Company had been purchasing power generated outside the State of Pennsylvania and had filed rates for service to Ellwood with the Commission. Penn Power then started generating within the state a part of its power requirements which were sufficient to serve Ellwood's needs, and therefore considered the service to Ellwood not within the Commission's jurisdiction. Penn Power then filed rates with the Pennsylvania Public Utilities Commission and was regulated by that Commission until this Court's decision in the *Colton* case which held that sales similar to those made by Penn Power to Ellwood were subject to the jurisdiction of the Commission because a part of the Company's power supplies were generated out of state. Penn Power then filed rate schedules with the Commission. Ellwood claimed that, during the interim, it had been charged rates which were in excess of Penn Power's rates which were on file with

the Commission and requested refunds accordingly. The Commission applied the Act as if Penn Power had properly filed rates with the Commission during the interim, and did not require refunds. On judicial review, the court affirmed. The court observed "[n]o statutory language prescribed the proper treatment for those who have in good faith failed to file." 583 F.2d at 647. The court held "[s]ince the companies were not culpable, they should not be punished for technical non-compliance." 583 F.2d at 648.

Similarly, *Plaquemines* arose out of this Court's decision in *State of California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), which held that the Commission had jurisdiction over any sales of natural gas actually commingled with gas to be resold in interstate commerce. Plaquemines had failed to make the applicable rate filings with the Commission prior to the Court's decision in *Lo-Vaca*. Contrary to its treatment in *Ellwood*, however, the Commission did not apply the Act retroactively as if Plaquemines had complied therewith, and required refunds on the basis that Plaquemines had not filed. On judicial review the Court reversed, holding that the Commission should ". . . regard as being done that which should have been done by recreating the past, insofar as is reasonably possible, to reflect compliance with the Act. . . ." 450 F.2d at 1337.

In *Highland Resources*, Highland had applied for a small producer's certificate and, relying on provisions of the Commission's regulations, failed to file notices of change in rate while the application was pending. The application was later denied by the Commission, and Highland filed the appropriate papers and ". . . asked that they be given

nunc pro tunc effect to July 21, 1974." 537 F.2d at 1339. The Commission refused. The Court reversed, holding that "[t]he FPC does not allege that Highland's application for a small producer certificate was patently frivolous or in bad faith . . . On remand, the Commission should give Highland's filings of June 11, 1975 retroactive effect." 537 F.2d at 1339.

Niagara Mohawk arose out of the Commission's long standing policy of dating hydroelectric licenses to reflect compliance with Section 23 of the Federal Power Act, 16 U.S.C. § 792 *et seq.* (1976), as if the licensee had applied for the license at the proper time, *See* the *Androscoggin* case, *Public Service Company of New Hampshire*, 27 FPC 830 (1962). The Commission had applied this practice since some time prior to 1944. *See Metropolitan Edison Company*, 6 FPC 189 (1947).

A final analogy is found in the aftermath of this Court's decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954). In applying its jurisdiction to independent producers under the *Phillips* case, the Commission consistently treated producers as having complied with the Act prior to the date of that case. *See* Order Nos. 174, 174-A and 174-B, 13 FPC 1195, 1410, 1576 (1954). This treatment included the abandonment provisions of Section 7(b) of the Act. In *Hewitt and Dougherty*, Docket No. CI75-762, ... FPC ..... (August 12, 1976), the well was depleted in April of 1954, and deliveries ceased before this Court's decision in *Phillips* on June 7, 1954. Citing Order No. 174, the Commission held "[w]e agree with Petitioner's arguments that Section 7(b) is not applicable . . . [i]nas-

much as H&D made no further sales from the Wright well after the April, 1954 cut-off date, H&D was neither required [to seek a certificate] nor seek abandonment approval . . ." (Mimeo, pp. 2, 3).

All of these situations have a common thread: the party was in good faith in failing to file, and the Commission applied the Act, or was required by the courts to apply the Act, as if the party had filed *at the proper time*. In the instant case, the Commission was similarly asked to apply the Act retroactively as of 1966. In the light of the evidence existing *at that time*, the court of appeals found that the Commission's failure to do so was erroneous.

The court held that the Commission had erred *as a matter of law* — not as to a matter of fact (App. 31a). That is, the error committed was not as to a factual issue within the expertise of the Commission. Instead, the Commission's error consisted of considering the wrong evidence in refusing to apply the Act retroactively. The Commission disregarded the only evidence in the record concerning the facts as they existed in 1966, when the papers should have been filed, and applied the evidence as it existed in 1975, when it issued its Opinion (Pet. App. 31). The *only* evidence concerning the facts existing in 1966 was the testimony of Haring, a petroleum geologist, that he had failed after diligent efforts to restore production, and that neither he nor United nor anyone else knew of any other reserves. Since the Commission could have reached but one conclusion based on this evidence, the court deemed it unnecessary to remand to the Commission to enter an order accordingly (App. 33a).

The court's holding is also within its equitable powers, for it fails to impose the devastating consequences of Haring's omissions on an innocent third party, McCombs.

3. **Haring's Actions Were in Good Faith.** When Haring acquired the Butler B Lease in 1966, the one gas well located on the lease was not producing (R. 201). He expended considerable efforts in attempting to re-establish production but his efforts ended in failure. He testified that he first installed a compressor at a cost of $12,000, and the well produced for approximately ten days and then was overcome by salt water (R. 201). He then brought in a workover rig and attempted workover operations for approximately two months during which small amounts of gas were porduced (R. 201). All production ceased on May 28, 1966 (R. 201). Haring was a petroleum geologist, and testified that neither he nor United, nor anyone else knew of any further production (R. 203). Since he believed that there was no more gas to deliver and since United had removed its equipment, he considered the 1953 Contract at an end (R. 202). When he received the Commission's letters inviting him to file an abandonment application, he consulted with his lawyer (R. 209). Neither Haring nor his counsel thought it necessary to file abandonment papers with the Commission under these circumstances (R. 211).

Their conclusions appear justified in the light of the existing judicial statements. In *Hunt* v. *FPC*, 306 F.2d 334, 342 (5th Cir. 1962), the court had said,

> ". . . the duty to continue to deliver and sell flows with the gas from the moment of first delivery *down to the exhaustion of the reserve*, or until the Commission, on appropriate terms, permits cessation of service under Sec. 7(b). . . ." (Emphasis added)

And in *Harper Oil Company* v. *FPC*, 284 F.2d 137, 139 (10th Cir. 1960), the court had said:

> "It would thus seem clear that when once an independent producer of gas has dedicated his production to interstate commerce and thereby has come under the jurisdiction of the Commission, he remains thereunder *so long as production continues.*" (Emphasis added)

Indeed, as recently as April 17, 1978, in oral argument before this Court in the case of *State of California* v. *Southland Royalty Company*, 46 U.S.L.W. 4539 (1978), the Commission adhered to those statements:

> "The Commission's position here is that this gas is dedicated *until the reserve is exhausted*, that in the words of the *Hunt* case the duty to deliver and sell flows with the gas from the moment of first delivery *down to the exhaustion of the reserve.*" (Emphasis added) Transcript, p. 11.

Haring justifiably could not believe that he would be required to continue service after no more gas could be produced from his well.

United, like Haring, did not think it necessary to file abandonment papers with the Commission when it removed its facilities, although Section 7(b) of the Act is equally binding on it. *United Gas Pipe Line Company* v. *FPC*, 385 U.S. 83 (1966). Similar to Haring, United's witness testified that ". . . we don't feel that's necessary" (R. 82).

In the light of the facts as they were known then, the filing could only have been for the purpose of the Commission's records, because the Commission could have taken no action in denying abandonment which was inconsistent with the facts. Further, the Commission, until the issuance of its opinion in the instant case, had done nothing to dispel the courts' statements in the *Hunt* and *Harper* cases and, according to the oral argument in *Southland*, continues to adhere to them today.

4. **Abandonment Permission Would Have Been Routinely Granted in 1966.** The Commission handles nearly all producer abandonment applications in routine fashion, merely acting on the papers without a formal evidentiary hearing. In 1966, the Commission disposed of 154 producer abandonment applications. Of these 154, only one was set for formal hearing and it was granted. *Charles L. Reed, et al.*, 35 FPC 954 (1966). The remaining 153 were disposed of without formal hearing, with 151 being granted. *See Producer List*, Producer Applications for Abandonment of Service Disposed of During the Period January 1, 1966 through June 30, 1966, 35 FPC 1201-1203 (1966); *Producer List*, Producer Applications for Abandonment of Service Disposed of During the Period July 1, 1966 through December 31, 1966, 36 FPC 1216-1221 (1966). Similar patterns exist for other years.

In light of the facts as Haring knew them in 1966, there is no doubt that the Commission would have granted him abandonment permission and probably would have done so in a routine fashion, as indicated above.

The Commission has recently recognized that it should grant abandonment where to do so merely recognizes what has occurred *de facto*. In *Arkansas Louisiana Gas Company*, Docket No. CP76-329, ... FPC ..... (March 8, 1977), Arkansas Louisiana Gas Company ("Arkla") had been selling excess gas to Mississippi River Transmission Company ("MRT"). However, in 1971 Arkla ceased delivering to MRT, and did not anticipate (as Haring did not in this case) that it would ever again have any excess gas to sell to MRT. The Commission held, "[u]pon consideration, we are persuaded that [the] public convenience and necessity will best be served by granting Arkla's application, thus lending *de jure* force to a state of affairs which has occurred *de facto*" (Mimeo. p. 2).

5. **A Proper Retroactive Application of the Act Neither Bypasses the Commission's Function Nor Deprives Interested Parties of a Right to be Heard.** The Commission and United argue against a proper retroactive application of the Act in this case on the grounds that the Commission would be deprived of exercising its Section 7(b) authority and that interested parties would be deprived of their right to be heard on the issue of abandonment.

This argument overlooks the fact that in this case the Commission was not *deprived* of its Section 7(b) authority, but rather McCombs asked the Commission to *exercise* that authority by retroactively applying the Act.[2] Further, no interested party has been deprived of a right to be heard on the issue of abandonment because that issue was one

[2] In making this request, McCombs properly reserved his objections to the Commission's jurisdiction.

of the issues which was actually tried before the Administrative Law Judge in this case, of which all interested parties had notice and opportunity to be heard, and in which United and the Commission in fact participated.

Due notice of the proceeding was issued by the Commission (R. 738). McCombs raised this issue in his first amended answer to United's complaint (R. 860-865). This answer was filed on January 8, 1974 at an early stage in the proceedings, and before the hearing conducted by the Administrative Law Judge. All interested parties had an opportunity to be heard and to introduce evidence on the issue. Yet, the only evidence produced was the testimony of Haring that neither he nor anyone else knew of any further production in 1966.

Therefore, if the court agrees with McCombs that retroactive application of the Act is proper in this case, the Commission will not be deprived of *exercising* its powers under Section 7(b), nor have the parties been deprived of a hearing on the issue.

B. McCOMBS' GAS RESERVES ARE NOT WITHIN THE PROHIBITION OF SECTION 7(b) OF THE NATURAL GAS ACT.

1. **Section 7(b) Applies to "Service Rendered."** Section 7(b) of the Act reads as follows:

> "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any *service rendered* by means of such facilities, without the permission and approval of the Commission first had and obtained after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." 15 U.S.C. § 717 f(b). (Emphasis added)

The Commission and United argue that the court of appeals erred in reversing the Commission's order in this case because the abandonment provisions of Section 7(b) were not complied with. The premise of this argument is that Section 7(b) is applicable, not only to Haring's shallow reserves from which there was "service rendered," but also to McCombs' deep reserves, from which there was no "service rendered."[3] This premise is in error. The cases construing Section 7(b) and the legislative history of that section clearly demonstrate that it is invoked only upon the commencement of deliveries of natural gas in interstate commerce. Once deliveries have been commenced, and the public has thereby relied on reserves supporting those deliveries, ". . . there can be no withdrawal of that supply from continued interstate movement without the Commission's approval." *State of California* v. *Southland Royalty Company*, 46 U.S.L.W. at 4540; *Sunray Mid-Continent Oil Company* v. *FPC*, 364 U.S. at 156; *Atlantic Refining Company* v. *Public Service Commission*, 360 U.S. at 389.

Thus, once Haring had commenced deliveries from his reserves, he was required to continue ". . . down to the exhaustion of the reserve . . ." (*Hunt* v. *FPC*, 306 F.2d at 342) and ". . . so long as production continues. . . ." *Harper Oil Company* v. *FPC*, 284 F.2d at 139. McCombs' reserves,

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[3] The court of appeals did not decide this broader issue of statutory construction, preferring instead to base its decision on the narrower equitable grounds set forth above.

however, were discovered more than five years after Haring's were depleted and lie at depths more than a mile greater than those of Haring. No reliance has been placed on McCombs' reserves, and McCombs never commenced deliveries from them in interstate commerce. They are not therefore within the abandonment prohibition of Section 7(b).

United's right to purchase reserves upon which no reliance has been placed rests, not on Federal law, but on the enforceability of 1953 contract under state law. This issue is pending before the district court in the Austin litigation.

2. **"Service Rendered" Involves Reliance by the Public.** Reliance is at the heart of Section 7(b). Once deliveries have been commenced in interstate commerce, and the public has relied on the reserves supporting those deliveries, Section 7(b) is applicable to those reserves, and contractual provisions which would cut off continuing deliveries must yield. *State of California* v. *Southland Royalty Company*, 46 U.S.L.W. 4539 (1978). The legislative history of that section clearly demonstrates that reliance is its touchstone.

The original drafts of the bills which evolved into the Natural Gas Act did not contain a requirement to obtain abandonment authority. H.R. 1162 and S. 4480. An amendment was offered during the subcommittee hearing on the House version on April 3, 1936, which provided:

> "No gas company, which is supplying gas to a public utility company, engaged in distributing such gas to the public, shall *discontinue* service to such public utility company without first obtaining from the Commission a certificate that public convenience and necessity permit such abandonment." (Emphasis supplied)

The amendment was based on a similar provision of the Interstate Commerce Act, 49 U.S.C. § 1(18). In commenting on the purpose of the amendment, the author stated:

> "If a company has established service to a distributing company, on which the public are dependent, and a rate is fixed by the Federal tribunal for that service which the company does not like, the company should not be in a position to say, 'we are permitted to abandon our service, and we will abandon it.' " *Hearing before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives,* 74th Congress, 2nd Session, p. 92.

This purpose has likewise been recognized extensively by the courts.[4]

In its order below, the Commission acknowledged:

> "And they [McCombs] are undoubtedly correct in their assertion that the purpose of Section 7(b) is to require the continuance of service once it has been commenced and the public has relied on it, and further, that Section 7(b) could not as a practicable matter have served that purpose when natural gas service from the Butler B tract was discontinued in 1966. . . ."

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[4] *State of California* v. *Southland Royalty Company*, 46 U.S.L.W. 4539, 4540 1978); *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 154 (1960); *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 389 (1959); *Alabama-Tennessee Natural Gas Co.* v. *FPC*, 417 F.2d 511, 515 (5th Cir. 1969); *Hunt* v. *FPC*, 306 F.2d 334, 342 (5th Cir. 1962); *Harper Oil Co.* v. *FPC*, 284 F.2d 137, 139 (10th Cir. 1960); *Michigan Consolidated Gas Co.* v. *FPC*, 283 F.2d 204, 214 (D.C. Cir. 1960); *Sunray Mid-Continent Oil Co.* v. *FPC*, 239 F.2d 97, 101 (10th Cir. 1956); *J. M. Huber Corporation* v. *FPC*, 236 F.2d 550, 558 (3rd Cir. 1956); *Farmland Industries* v. *Kansas-Nebraska Natural Gas Co., Inc.*, 349 F.Supp. 670, 680 (D.C. Nebr. 1972).

Applying these principles to the case at bar, it is manifest that the legislative purpose of Section 7(b) would not be served by the Commission's interpretation. The "service rendered" in this case was that by Haring and his predecessors, from formations at approximately 2,900 feet, which service was discontinued due to exhaustion of reserves in 1966. Thus, the legislative purpose of requiring *continuing* service cannot be served by requiring McCombs, thirteen years later, to deliver to United from the deep reserves which McCombs discovered in 1971. Further, Mr. Haring testified,

> "Certainly, I was not aware of gas reserves at deeper levels when gas production ceased in 1966, and, so far as I know, neither United nor anyone else was aware of its existence" (R. 202).

Clearly, no reliance has been placed on the deep reserves discovered by McCombs in 1971. The legislative purpose of requiring continuance of deliveries upon which the public had relied would not be served in this case by the Commission's interpretation of the Natural Gas Act.

3. **The Words "Service Rendered" Are to Be Accorded Their Plain Meaning.** In this case, there has been an exhaustion of reserves from shallow reservoirs by predecessors in interest, and the Commission seeks to order successors in interest to make initial deliveries from deep reservoirs which they have discovered and which were previously unknown. There are no reported cases dealing with this situation. However, the reported cases do demonstrate that the mere fact that the deep reserves are covered by the same certificate, contract, or lease as the shallow reserves does not bring the deep reserves within Section

7(b). Hence, the Commission's emphasis on the fact that ". . . there was no provision in the lease, the contract, or the certificate limiting the depth of origin of the gas to be delivered from the Butler B tract . . ." (Commission's Brief, p. 5) provides no support for its position.

"Service rendered" is not dependent on or measured by a certificate, for the reason that service is required to be continued under Section 7(b) even where there is no certificate, *Mesa Petroleum Co.* v. *FPC*, 441 F.2d 182 (5th Cir. 1971). Moreover, the issuance of a certificate does not require service to be initiated. *Sun Oil Co.* v. *FPC*, 364 U.S. 170 (1960); *Sunray Mid-Continent Oil Company* v. *FPC*, 364 U.S. 137 (1960); *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 (1959). Under these cases, the Commission does not have authority to require initial deliveries merely because gas is covered by a certificate.

For example, assume a pipeline company were to be granted a certificate authorizing it to serve two customers, A and B. The company commences deliveries to A, but not to B. A has then relied on deliveries to it and is entitled to the protection of Section 7(b). However, the mere fact that deliveries have commenced to A and that the same certificate authorizes services to both A and B does not require the company to deliver to B. B is entitled to the protection of Section 7(b) only when deliveries have been commenced to B, i.e., when there is "service rendered," and B has relied thereon. Similarly, the fact that Haring commenced deliveries from his reserves and that the same certificate authorized service from both Haring's and McCombs' reserves, does not require McCombs to deliver to

United. The public is entitled to the protection of Section 7(b) only when deliveries have commenced, *i.e.*, where there has been a "service rendered" and the public has relied on the reserves supporting those deliveries.

Just as "service rendered" is not dependent on or measured by a certificate, neither is it dependent on or measured by a gas purchase contract. Service must be continued although there is no contract. *Nelson Bunker Hunt Trust Estate*, 15 FPC 743 (1956); *Dixie Pipe Line Co.*, 14 FPC 106 (1955). Service must also be continued even though the contract is terminated. *United Gas Pipe Line Co.* v. *FPC*, 385 U.S. 83 (1966); *Harper Oil Co.* v. *FPC*, 284 F.2d 137 (10th Cir. 1960); *J. M. Huber Corp.* v. *FPC*, 236 F.2d 550 (3rd Cir. 1956), *cert. denied* 352 U.S. 971 (1957); *FPC* v. *J. M. Huber Corp.*, 133 F.Supp. 479 (D.N.J. 1955). Further, the Commission does not have the authority to require the initiation of service merely because a producer's reserves are covered by a contract. *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 (1959).

In similar manner, it may be shown that "service rendered" is not measured by the oil and gas lease described by the gas purchase contract for the reason that service must be continued although the lease terminates. *State of California* v. *Southland Royalty Co.*, 46 U.S.L.W. 4539 (1978). Further, oil and gas leases are not "facilities subject to the jurisdiction of the Commission" within the meaning of Section 7(b) and are therefore transferable without Commission authorization under Section 7(b) where, as here, they do not constitute a sale for resale of developed

reserves to an interstate pipe line company. *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949); *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 (1965).

Thus, the teaching of the decided cases is that "service rendered" under Section 7(b) of the Act does not mean the service "authorized" by a certificate under Section 7(c) of the Act, nor is it measured by the gas purchase contract under which service is authorized to commence, nor the oil and gas lease which is covered by that gas purchase contract. The conclusion is inescapable that "service rendered" includes no more than the plain meaning which those words would indicate: the actual deliveries of gas in interstate commerce.

Applying this rule to the facts at hand, the "service rendered" to which the prohibition of Section 7(b) applies was the deliveries by Haring, and his predecessors, from reservoirs underlying the Butler B Lease at a depth of approximately 2,900 feet. That service was discontinued in 1966 due to depletion of reserves. The production discovered by McCombs in 1971 is from other reservoirs at approximately 8,000 to 9,000 feet, and was unknown at the time of the depletion of the Haring reserves in 1966. This production is thus separate and distinct from the "service rendered" by Haring and his predecessors, and is therefore not within the prohibition of Section 7(b) of the Act.

4. **A Contrary Construction of the Words "Service Rendered" Would Require Federal Law to Invade Legitimate State Interests Where There is No Federal Interest to Protect.** The Commission's interpretation of the Act in this case makes

the Act a silent lien on an oil and gas lease because there is no method by which a producer proposing to take an assignment of an oil and gas lease can protect himself from the consequences of the Commission's interpretation; *i.e.*, there is no method by which the assignee can determine whether the Commission has permitted abandonment with respect to a particular lease.

The Commission's abandonment orders are not filed of record in the county recorder's office, and are probably not recordable in most states. Further, inquiry to the Commission would prove futile. The Commission's records are not kept by tracts, and the names under which the Commission's dockets are kept may or may not appear in the producer's chain of title because the Commission requires that only "operators" make filings with the Commission, which "operator" may or may not have had a leasehold interest in the lease in question. Moreover, the Commission's Staff is ill-equipped and probably unprepared to make a search in response to a producer's inquiry.

The Commission's interpretation of the Act is therefore unreasonable, and at odds with the legitimate State policy of free alienability embodied in the recording acts. Further, this interpretation is not required, because in this case there is no Federal interest to be protected in requiring continuing deliveries.

5. **Summary.** The "service rendered" from the Butler B Lease was abandoned by Haring in 1966 due to the depletion of known reserves. McCombs discovered separate and distinct reserves in 1971, upon which the public has not relied. McCombs had no knowledge that the Commis-

sion had not permitted abandonment in 1966, and there is no method available by which he might have protected himself in this regard. The courts have recognized that the requirement to continue service lasts only "down to the exhaustion of the reserve" (*Hunt* v. *FPC*, 306 F.2d 334, 342 (5th Cir. 1962)), and only "so long as production continues." *Harper Oil Co.* v. *FPC*, 284 F.2d 137, 139 (10th Cir. 1960). Hence, in 1966 the requirement to continue service from the Butler B Lease came to an end.

C. THE NATURAL GAS POLICY ACT OF 1978 HAS LITTLE RELEVANCE TO THIS CASE.

The Natural Gas Policy Act of 1978 contains a definition of "committed or dedicated to interstate commerce," as follows:

> "(A) GENERAL RULE.—The term 'committed or dedicated to interstate commerce,' when used with respect to natural gas, means—
>
> (i) natural gas which is from the Outer Continental Shelf; and
>
> (ii) natural gas which, if sold, would be required to be sold in interstate commerce (within the meaning of the Natural Gas Act) under the terms of any contract, any certificate under the Natural Gas Act, or any provision of such Act.
>
> (B) Exclusion.—Such term does not apply with respect to—
>
> (i) natural gas sold in interstate commerce (within the meaning of the Natural Gas Act)—
>
> (I) under section 6 of the Emergency Natural Gas Act of 1977;

(II) under any limited term certificate, granted pursuant to section 7 of the Natural Gas Act, which contains a pregrant of abandonment of service for such natural gas;

(III) under any emergency regulation under the second proviso of section 7(c) of the Natural Gas Act; or

(IV) to the user by the producer and transported under any certificate, granted pursuant to section 7(c) of the Natural Gas Act, if such certificate was specifically granted for the transportation of that natural gas for such user;

(ii) natural gas for which abandonment of service was granted before the date of enactment of this Act under section 7 of the Natural Gas Act; and

(iii) natural gas which, but for this clause, would be committed or dedicated to interstate commerce under subparagraph (A)(ii) by reason of the action of any person (including any successor in interest thereof, other than by means of any reversion of a leasehold interest), if on May 31, 1978—

(I) neither that person, nor any affiliate thereof, had any right to explore for, develop, produce, or sell such natural gas; and

(II) such natural gas was not being sold in interstate commerce (within the meaning of the Natural Gas Act) for resale (other than any sale described in clause (i)(I), (II), or (III)." Section 2(18).

The third exclusion to the definition contained in (B)(iii) is, according to the Conference Committee Report, intended to limit further extensions of this Court's holding in *State of California* v. *Southland Royalty Company*, 46 U.S.L.W. 4539 (1978). The Commission and United argue

that it is significant that McCombs' gas does not fall within the *Southland* exclusion.

This argument is of little consequence, for the reason that the McCombs' reserves are not within the definition itself. That is to say, as demonstrated above, the gas is not required to be sold in interstate commerce. There is therefore no need for the gas to fall within one of the statutory exclusions to that definition. Further, it is difficult to see how any manifestations of intent by the 95th Congress which enacted the Natural Gas Policy Act of 1978 can shed light on the intent of the 75th Congress which enacted the Natural Gas Act in 1938, or what relevance the intent of the 95th Congress would have to this case if it were attributed to the 75th Congress.

It is, however, worthy to note that under Section 601(a)(1)(b) of the Natural Gas Policy Act, Section 7(b) of the Natural Gas Act no longer applies to wells commenced after February 19, 1977, regardless of whether gas produced from those wells is sold for resale in interstate commerce. As the average life of a natural gas well is 15 years,[5] the problem in the instant case will rapidly recede into history with the passage of time. Moreover, it is significant that the 95th Congress did not consider a Federal statutory obligation to continue service rendered to be an essential part of a scheme for regulation of producer prices which is similar to that under the Natural Gas Act. There is no provision similar to Section 7(b) contained in the Natural Gas Policy Act.

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[5] See FPC Opinion No. 770 ..... FPC ..... (1976) mimeo. p. 23.

Finally, whatever the term "dedicated" may mean under the Natural Gas Policy Act of 1978 is not relevant to this case, because here the question is what that term means with respect to the Natural Gas Act. This Court, in *State of California* v. *Southland Royalty Company*, 46 U.S.L.W. 4539 (1978), recently answered by holding that "dedicated" with respect to the Natural Gas Act simply means that the gas is subject to Section 7(b) of the Act. The issue in this case is similar: whether McCombs' gas reserves are subject to Section 7(b) of the Natural Gas Act.

V.
CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January, 1979

FOR ARGUMENT

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-17

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

BILLY J. McCOMBS, *et al.*,
Respondents.

No. 78-249

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

BILLY J. McCOMBS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER UNITED GAS PIPE LINE COMPANY

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February 14, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

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REPLY BRIEF OF PETITIONER UNITED GAS PIPE LINE COMPANY

The court below held that a lawful abandonment of a producer's certificated service obligation under Section 7(b) of the Natural Gas Act was effected by the fact that gas production ceased from the reserves known to exist on the dedicated acreage. Ignoring the *de facto* abandonment rationale adopted by the court below, the

respondents, the McCombs Group, argue that the holding of the court below should be sustained as an abandonment retroactively authorized. Alternatively, the McCombs Group argues that the certificate obligation did not extend to the newly discovered reserves involved here because production from such reserves was not part of the service originally rendered. The decision below cannot be sustained on either ground.

1. For the reasons stated in Argument IV of United's opening brief (pp. 25-29), retroactive abandonment (or *nunc pro tunc* abandonment) is unwarranted here. The two additional cases cited by the McCombs Group in its brief on the merits add nothing to those previously cited in its opposition to certiorari. The first, *Borough of Ellwood City* v. *FERC*,[1] is a case like *Highland Resources, Inc.* v. *FPC*,[2] where the Commission excused a past failure to file to prevent the prejudice that a regulated firm would otherwise have incurred because it had acted upon an agency interpretation of filing requirements later determined to be incorrect by the courts. For the reasons stated in United's opening brief (pp. 28-29), the principle of these cases is inapplicable here because the producers did not act in accordance with any existing Commission regulations but, on the contrary, ignored two letters from the Secretary of the Commission informing them that an abandonment filing was required. (Pet. App. 97-98, 100.)

The second case cited by the McCombs Group, *Arkansas Louisiana Gas Company*,[3] has no bearing on the

[1] 583 F.2d 642 (3d Cir. 1978), petition for cert. filed, No. 78-945.

[2] 537 F.2d 1336 (5th Cir. 1976).

[3] Docket No. CP76-329, —— FPC —— (1977).

issues here. That Commission order involved a certificate for Arkansas Louisiana Gas Company ("Arkla") to sell gas to another pipeline when and if Arkla had such gas available, *i.e.*, there was never any obligation to sell any particular quantity of gas. Arkla's supply had diminished to the point where it had not sold any gas under the certificate for a long period of time. Although recognizing that Arkla's service under the certificate had long since ceased, the Commission's order granting abandonment had prospective application only and was based on the facts as they existed at the time abandonment was permitted. In contrast, the abandonment sought by the McCombs Group here would have retroactive application and would be based on factual assumptions now known to be incorrect.

Not only do the cases cited by the McCombs Group fail to support its argument for retroactive abandonment, but also the record in this case lacks support for the factual predicate upon which that argument is based. The McCombs Group contends that the Commission should be required to authorize abandonment retroactively based on the assertions that McCombs' predecessor in interest acted in "good faith" in failing to file for abandonment between 1966 and 1971 and that McCombs was "totally innocent" in failing to perceive that the new production from the Butler B lease was committed to United. (Br. 8-9, 13-20.) The Commission, however, made no findings on either of these contentions. Indeed, there is substantial evidence in the record that contradicts the assertions upon which the McCombs Group relies. For example:

a. The record does not show any adequate basis for the assumption by the McCombs Group's predecessor, Louis Haring, that the contract with United ceased to be effective. Haring admitted that this

assumption was not based on communications with United; indeed, he stated that he never discussed the matter with anyone at United. (R. 209.) In contrast, the communications from United to Haring demonstrate that United viewed the contract as remaining in effect. When production ceased in 1966, United's letter to the operators informing them of the removal of its field measuring system clearly contemplated the possibility of future deliveries that would be subject to the 1953 contract. (Ex. 4; R. 47-48, 55, 404; Ex. 31; R. 242, 578-79.) Moreover, by letter dated June 23, 1969, United offered to set a new price under the contract, an action plainly at odds with any assumption by the producer that the contract with United was no longer in effect. (Ex. 5; R. 55, 405.) And significantly, the producers never made any response to United indicating that their view of their obligation under the 1953 contract was different from United's.

b. The record does not show adequate reasons why Haring felt it was unnecessary to file for abandonment after production from the lease ceased in 1966. In his testimony, Haring stated that his belief on this point was based on discussions with one of his co-owners who was a lawyer. (R. 208-09, 211-12.) He did not state the basis for the co-owner's point of view. The McCombs Group attempts (Br. 18-19) to justify Haring's position on the basis of "existing judicial statements" on abandonment by certain Circuit Courts of Appeal.[4] Citation of this authority, however, carries no weight, since decisions by this Court had made it clear that Commission approval based on a hearing and statutory finding was necessary in order for

[4] Hunt v. FPC, 306 F.2d 334, 342 (5th Cir. 1962); Harper Oil Co. v. FPC, 284 F.2d 137, 139 (10th Cir. 1960).

an abandonment to be effected.[5] Moreover, on two separate occasions the producers involved here received letters from the Secretary of the Commission expressly advising them that if no further sales were contemplated, it would be necessary to file applications with the Commission to abandon service. (Pet. App. 97-98, 100.) Notwithstanding these letters, the producers never sought Commission approval for abandonment.

c. The record is by no means clear that the McCombs Group was "totally innocent" in failing to recognize that the new production from the Butler B lease was committed to United. After the McCombs Group received a title opinion disclosing United's contract covering the Butler B lease, the Group's negotiator, Bill Forney, continued to deal with United as if the McCombs Group had an unencumbered right to market the gas. His explanation was that Louis Haring had told him that there was a letter in Haring's files evidencing United's release of its contract rights. (R. 257.) However, Haring testified that he never told Forney of any such document. Indeed, Haring testified that the alleged conversation with Forney never took place. (R. 223.) In any event, the McCombs Group concedes that there never was any such letter. (Br. 7-8.)

d. Finally, there is conflicting evidence in the record as to whether Forney responded to United's inquiry about the source of the McCombs Group's right to the gas. The witness for United asserted that Forney represented that the leases were unencumbered and that United relied upon this assertion. (R. 89-90.)

[5] United Gas Pipe Line Co. v. FPC, 385 U.S. 83, 89 (1966); Sunray Mid-Continent Oil Co. v. FPC, 364 U.S. 137, 156, 158 n.25 (1960).

Thus, the record is by no means clear on the "good faith" allegations upon which the McCombs Group relies in arguing for retroactive abandonment. More important, the Commission made no finding on either Haring's good faith or on the McCombs Group's total innocence. Even on the McCombs Group's theory, a finding by the Commission of good faith failure to file would be necessary to support a retroactive abandonment order. Since it is for the Commission and not the courts to resolve disputed issues of fact,[6] the retroactive abandonment argument of the McCombs Group provides no basis for sustaining the decision of the court below.

2. The McCombs Group's contention that a distinction exists between the service certificated under Section 7(c) of the Natural Gas Act and the service which is subject to the abandonment requirement of Section 7(b) is based on a construction of the Act which is clearly incorrect and at odds with its purposes. The interrelation between these two sections was described by this Court in *Sunray Mid-Continent Oil Company* v. *FPC:*

> An initial application of an independent producer, to make movements of natural gas in interstate commerce, leads to a certificate of public convenience and necessity under which the Commission controls the basis on which 'gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval . . . .'[7]

[6] FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331-34 (1976); SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1943).

[7] 364 U.S. 137, 156 (1960), *quoting,* Atlantic Ref. Co. v. Public Serv. Comm'n of New York, 360 U.S. 378, 389 (1959).

This discussion makes clear that the supply "so dedicated" under Section 7(c) is identical to "that supply" for which Section 7(b) abandonment authorization must be sought.

The assertions of the McCombs Group notwithstanding, it is well established that the certificate and the contract upon which the certificate is based define the service that is subject to the abandonment requirement of Section 7(b).[8] Applying this principle, the Fifth Circuit in *Mitchell Energy Corp.* v. *FPC*[9] held that reserves not known to exist at the time of the original certificate were nevertheless subject to the producer's service obligation and the abandonment requirements of Section 7(b). As in *Mitchell Energy,* there is no depth limitation in the lease or in the contract here. Indeed, the contract expressly covers "merchantable natural gas . . . produced from all wells now or hereafter drilled during the term of this contract on the lands and leasholds" subject to the contract. (R. 45-46, 365.) Thus, as in *Mitchell Energy,* the deeper reserves are dedicated as well as the shallow reserves that were producing when the certificate was granted.

The McCombs Group's argument is that the producer's obligation to supply gas in interstate commerce is limited to that service within the certificate that the producer chooses to undertake. On this theory, the producer's obligation to interstate commerce is determined to a large extent by the producer, *i.e.,* "service rendered" includes no more than the producer's "actual

[8] Murphy Oil Corp. v. FERC, No. 77-1720 (8th Cir., Dec. 28, 1978); Harrison v. FERC, 567 F.2d 308 (5th Cir. 1978); Phillips Petroleum Corp. v. FPC, 556 F.2d 446 (10th Cir. 1977); Vreeland v. FPC, 528 F.2d 1343 (5th Cir. 1976).

[9] 533 F.2d 258 (5th Cir. 1976).

deliveries of gas in interstate commerce." (McCombs Group Br. 29.) This is clearly at odds with the Natural Gas Act's purpose of ensuring that the Commission may "control both the terms on which a service is provided to the interstate market and the conditions on which it will cease." [10]

CONCLUSION

For the foregoing reasons, and the reasons stated in United's opening brief, the judgment of the court below should be reversed.

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February 14, 1979

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[10] California v. Southland Royalty Co., 436 U.S. 519, 524 (1978).

Nos. 78-249 and 78-17

In the Supreme Court of the United States

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PETITIONER

v.

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UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

In this case the court of appeals held that the cessation of production of natural gas from a leasehold from 1966 to 1971 effected a lawful abandonment of certificated service under Section 7(b) of the Natural Gas Act (15 U.S.C. 717f(b)), even though no one during that time sought or obtained abandonment permission from the Commission and even though respondents are now producing and selling gas from the leasehold. In response to our contention that the court's decision is contrary to

Section 7(b), which requires the Commission's approval for abandonment, respondents have argued (1) that the court did not usurp the Commission's function under Section 7(b) but rather held that the Commission erred as a matter of law in failing to authorize abandonment retroactively (Resp. Br. 13-22), and (2) that in any event the gas reserves from which respondents are currently producing were never dedicated to interstate commerce because they are allegedly different from the reserves on the same leasehold from which gas was produced before 1966 (*id.* at 22-31). Both arguments are incorrect.

I

a. Respondents misstate the court of appeals' holding when they claim that the court reversed the Commission for refusing in this proceeding to grant retroactive abandonment. The court did not hold that the Commission had erred in declining to grant an abandonment application, retroactive or otherwise. It held that the facts of this case—cessation of production from 1966 to 1971—rendered any Commission determination of the abandonment question pursuant to Section 7(b) unnecessary.[1]

b. Moreover, if the court had done what respondents claim it did, and considered and reversed the Commission's refusal in this proceeding to grant abandonment retroactively, its decision would have been erroneous under Section 7(b). That Section provides that no natural gas company shall abandon certificated facilities or service "without the permission and approval

[1]The court stated, for example, that "there was an abandonment under Section 7(b) of the Natural Gas Act which does not render the issue within the expertise of the Commission;" that "there was no need for the formality of a Section 7(b) hearing;" and that "strict compliance with the non-abandonment language of [Section 7 (b)] does not control under the facts and circumstances here" (A. 31A-33A). See our main brief at pages 34-37.

of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted * * * or that the present or future public convenience or necessity permit such abandonment." By requiring a "due hearing" and "a finding by the Commission," Section 7(b) seeks to ensure that all interested parties will have an opportunity to examine the facts respecting an abandonment application at the time those facts are alleged to exist, and that the Commission, as the expert agency entrusted with the task, will have an opportunity to make a determination based on those facts at that time. In addition, by prohibiting abandonment until the Commission has formally approved it, the Section provides certainty and reliability by giving interested parties a clear and definitive public statement of whether once-dedicated acreage remains dedicated to interstate commerce. As this Court said in *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 158 n.25 (1960):

> [I]f [natural gas] companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under §7(b). The Commission thus, even though there may be physical problems beyond its control, kept legal control over the continuation of service by the applicants.

The Commission's denial in this proceeding of respondents' request for abandonment authority retroactive to the period 1966 to 1971 was firmly grounded in the purposes of Section 7(b), and if the court of appeals had considered and reversed that action (as respondents claim it did), its decision would have been error. Respondents claim that the Commission erred as a matter of law in refusing to grant retroactive abandonment because (1) the

Commission assertedly would have granted an abandonment application if one had been filed in 1966-1971, and (2) the failure of respondents' assignor, Haring, to apply for abandonment at that time was allegedly in "good faith" (Resp. Br. 18-21).

For the court to have held that the Commission had to grant retroactive abandonment because it would have granted abandonment if an application had been timely filed would defeat Section 7(b)'s purpose of providing interested parties such as United with an opportunity to examine and possibly rebut, at the relevant time, the facts alleged in support of the abandonment application. It is no answer for respondents to claim (Br. 22) that all interested parties had a surrogate opportunity in these proceedings a number of years later. No one knows what evidence the parties or the Commission might have produced if an application had been filed, and a hearing held, at the relevant time.[2] And in contending that the

[2]Respondents repeatedly assert that on the facts known in 1966, "there is no doubt that the Commission would have granted * * * abandonment permission and probably would have done so in a routine fashion * * *" (Resp. Br. 20; see also Br. 9, 17.) There is no basis for this speculation, since no application for abandonment was filed and thus no one had any reason or occasion to investigate the assertion of respondents' predecessor, Haring, that the reserves underlying the leasehold had been depleted in 1966. Since ample reserves have subsequently been discovered under the leasehold, a geological examination prompted by an abandonment application might well have indicated the existence of those reserves during the period the leasehold was not producing. Because no application was filed, the Commission, United, and other interested parties had no occasion to conduct such an examination. However, when United was informed in 1966 that the well on the property had ceased producing, it did not acknowledge that the reserves under the leasehold had been depleted; instead it informed the producer that it would reinstate its equipment "if, at some future date, you have further gas to deliver to us at the above delivery point, which will be subject to the terms of the [1953 gas sales contract, as extended]." (A. 8A-9A.) At all events, what the evidence might have shown if an application has been filed is immaterial; Section 7(b) does not require

Commission should be reversed for having disregarded, in this proceeding, "the only evidence in the record concerning the facts as they existed in 1966, when the papers should have been filed" (Br. 17; see also *id.* at 22), respondents overlook the evidentiary fact that dominates the present record: the fact that the reserves under the leasehold were not depleted in 1966, because they are not depleted now.

Respondents' theory would also undermine Section 7(b)'s objective of providing certainty in the regulatory scheme. Interested persons such as prospective assignees of dedicated acreage, or purchasers of gas from such acreage, would never know whether, at some future time, the Commission might determine that the service of supplying gas from the acreage should be deemed to have been previously abandoned.

Respondents' claim that Haring's failure to file for abandonment in 1966 ("when the paper should have been filed" (Br. 17)) was in "good faith," and based on advice of counsel that an application was unnecessary, is wholly irrelevant. Even if it were assumed that Haring operated under a sincere mistake of law, a person cannot escape his failure to comply with statutory requirements by claiming ignorance of the law, and he is certainly not entitled to benefit from his ignorance or non-compliance at the expense of those whom the statute was designed to protect.[3]

For all these reasons, the Commission was well within its authority under Section 7(b) in refusing to grant respondents' request that abandonment be authorized retroactively to some date between 1966 and 1971.

the Commission to speculate about what evidence would have been developed or what it would have done if respondents or their predecessors had complied with the statutory procedures.

[3]Respondents' claim that Haring acted in "good faith" is unfounded in any event. Haring's "good faith" consisted, as

c. Respondents rely (Br. 13-18) on several cases in support of their claim that the Commission should have granted retroactive abandonment here. Those cases, which (with one exception) did not involve abandonment under Section 7(b),[4] do not support respondents in any event. To the contrary, they reflect the same general principle that underlies the Commission's decision here: that administrative remedies should be designed to promote compliance with statutory requirements and not to reward noncompliance.

Plaquemines Oil and Gas Co. v. *FPC*, 450 F. 2d 1334 (D.C. Cir. 1971), and *Niagara Mohawk Power Corp.* v. *FPC*, 379 F. 2d 152 (D.C. Cir. 1967), were cases in which parties had failed to seek Commission authorization for their acts at a time when such authorization was required by the relevant statutes and decisions. To prevent those parties from benefitting from their failure to comply with the law, the Commission fashioned remedies on the basis of the assumption that the statutory requirements had been complied with at the proper time, and the courts approved the Commission's remedies as imposing "a condition that puts the wrongdoer in no worse stance

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respondents concede (Br. 5, 18), of his considered and deliberate refusal to file an abandonment application in the face of letters from the Secretary of the Commission stating that "it will be necessary" to do so if no further sales of gas were contemplated (see our main brief at 6-7).

[4]The exception, cited by respondents at Br. 21, *Arkansas Louisiana Gas Company*, FPC Docket No. CP76-329 (March 8, 1977), involved no retroactivity question and provides no support for respondents. In that case a certificated pipeline had contracted to sell "excess gas" (gas supplied to it in excess of its other needs), but in 1971 its supplier ceased providing any such excess gas. In essence, its supply had become depleted in 1971 and remained depleted in 1977, when the seller sought and obtained abandonment permission from the Commission. The seller in that case, unlike respondents and their predecessors, recognized the necessity of obtaining abandonment permission even though its supply of gas was physically depleted.

than the company that has punctiliously observed the requirements of law * * *." *Niagara Mohawk Power Corp.* v. *FPC, supra,* 379 F. 2d at 159.[5]

Borough of Ellwood City v. *FERC,* 583 F. 2d 642 (3d Cir. 1978), petition for cert. filed, No. 78-945, and *Highland Resources, Inc.* v. *FPC*, 537 F. 2d 1336 (5th Cir. 1976), were cases in which a party failed to tender filings in reasonable reliance either on Commission regulations or on the law that existed at that time (which was subsequently changed to impose a filing requirement not previously thought to exist). In those cases the courts upheld the Commission's discretion to forgive the earlier failures to file, so long as filings were promptly made after the change in law. In this case, respondents make no claim that the failure to seek abandonment permission in 1966-1971 was based on Commission regulations or pronouncements or was permitted by the law existing at that time.

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[5]See also *Plaquemines Oil and Gas Co.* v. *FPC, supra,* in which the court stated (450 F. 2d at 1337-1338):

> [T]he Commission, in acting upon applications for certification filed some time after Commission jurisdiction was asserted * * * has the equitable power "to regard as being done that which should have been done" by recreating the past, insofar as is reasonably possible, to reflect compliance with the Act and to order refunds to be paid if necessary to achieve that goal.

That case involved a producer who failed to file for certificates authorizing gas sales from 1961 (when the Commission first asserted jurisdiction over the sales) to 1966, and the Commission concluded that it would be appropriate to order the producer to refund whatever charges were in excess of those that the Commission would have authorized as just and reasonable if certificates had been sought and obtained. The court approved the Commission's general principle, but reversed with respect to certain refunds on the ground that the Commission had failed to apply its principle to those refunds. 450 F. 2d at 1337-1341. The court's decision does not support respondents' claim (Br. 15) that the Commission must treat them as having properly sought and obtained abandonment in 1966-1971 and thus permit them to evade the obligations and requirements of the Act.

The Commission's decisions in those cases and in this case are based on the same principle: remedies should be fashioned to promote and ensure compliance with statutory procedures and to prevent rewarding non-compliance. In some cases that principle requires the Commission to regard as having been done that which should have been done. In other cases, where there has been a change in law imposing new requirements, it may be inappropriate to impose those requirements retroactively, since to do so would not have the effect of promoting compliance. In cases where, as here, there has been no change in law, and retroactive relief would benefit a party for having failed to comply with statutory requirements, the Commission properly declined to grant such relief.[6]

II

Respondents also contend (Br. 22-31) that the reserves of gas from which they are currently producing were never dedicated to interstate commerce because they are different from the reserves from which their predecessors produced until 1966. That contention is contrary to the record and to this Court's decisions concerning the scope of dedications under the Natural Gas Act.

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[6]Respondents' contention comes down to the proposition that an agency should regard a person as having complied with a statutory authorization requirement at some earlier time if the agency probably would have granted the authorization if it had been sought at that time. We know of no cases supporting that proposition. If sustained, it would have a dramatic impact in virtually every field of administrative law. It suggests that in any case where a person must obtain a license or other regulatory authority for certain action (*e.g.*, a license to drive a car, or an extension of an alien's visa), a person could defend an action charging him with failure to obtain such authority on the ground that if he had applied for it the agency probably would have granted him the authorization. Few regulatory systems could operate under such a principle.

As stated in our main brief (at 4-5), in 1953 Mrs. Bee Quin, as lessee of the Butler B tract, executed a gas sales contract with United in which she agreed to sell "merchantable natural gas * * * produced from all wells now or hereafter drilled during the term of this contract on the land and leaseholds" covered by the contract. The term of that contract was later extended to 1981. In 1954, Mrs. Quin applied for and received certificates from the Commission authorizing sales of gas covered by the contract in interstate commerce to United. The certificate contained no time limitation (Pet. App. A-32 to A-33), and the certificate, contract, and lease contained no provision limiting the depth of origin of the gas to be delivered from the Butler B tract (Pet. App. A-32 to A-33; A. 13A-14A).[7]

Under principles firmly established by this Court and the courts of appeals, the certificate issued by the Commission thus imposed an obligation on respondents to continue the service of supplying all gas produced from the leasehold to interstate commerce, as undertaken in the original contract and certificate application. As this Court explained in *Sunray, supra,* 364 U.S. at 156, the scope of the service that is dedicated to interstate commerce is determined by the certificate application and the certificate itself:

> An initial application of an independent producer, to make movements of natural gas in interstate commerce, leads to a certificate of public convenience and necessity under which the Commission controls the basis on which "gas may be initially dedicated to

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[7]When the original contract was amended to extend its term to 1981, a later assignee of the lease, Pagenkopf, obtained a new certificate that authorized the same service as the original certificate (A. 6A-8A; FERC Br. 5). Those changes did not diminish the scope of the initial service obligation.

> interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval * * *" [quoting *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 389 (1959)].

In this case respondents' predecessors sought and obtained a certificate of unlimited duration authorizing sales of all gas produced from the Butler B lease, and initiated service under that certificate. In those circumstances, as this Court recently reaffirmed in *California* v. *Southland Royalty Co.*, 436 U.S. 519, 525 (1978):

> [O]nce gas began to flow in interstate commerce from a field subject to a certificate * * *, that flow could not be terminated unless the Commission authorized an abandonment of service. The initiation of interstate service pursuant to the certificate dedicated all fields subject to that certificate.

See also *Murphy Oil Corp.* v. *FERC*, No. 77-1720 (8th Cir. December 28, 1978); *Harrison* v. *FERC*, 567 F. 2d 308 (5th Cir. 1978); *Phillips Petroleum Co.* v. *FPC*, 556 F. 2d 466 (10th Cir. 1977); *Mitchell Energy Corp.* v. *FPC*, 533 F. 2d 258 (5th Cir. 1976). In short, respondents' claim that the certificate dedicated only the first reservoir from which gas was produced under the leasehold finds no support in the record or in decisions under the Natural Gas Act.[8]

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[8]In support of this claim, respondents appear to argue that the purpose of the Natural Gas Act is to protect the reliance of the consuming public that is created by initial deliveries in interstate commerce, and that the public relies only on the reservoirs from which that initially delivered gas is produced (Resp. Br. 24-26). There is no basis for the claim that the public's reliance is so limited. If the public relies on anything, it relies on the service proposed in the certificate application and contract and authorized by the certificate, all of which refer to gas produced from specified acreage, not from specified wells or reservoirs.

Moreover, respondents' theory would be difficult, at best, to administer. Respondents claim that "[n]o reliance has been placed on McCombs' reserves" (Br. 24) because of the difference in depth between the initial producing well and the later-discovered ones (see *id.* at 24, 26, 29). Respondents do not suggest how great the difference in depth must be—just as they do not suggest how long the time period between production must be—in order to free the new well from the dedication of the earlier one. Any attempt by the Commission—much less the courts, as respondents here propose—to draw such lines would invite administrative chaos. It would also ignore the mechanism that Congress has provided, in the abandonment provision of Section 7(b), for delineating the scope of dedications under the Act.

CONCLUSION

For the foregoing reasons and the reasons given in our main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

ROBERT R. NORDHAUS
General Counsel
Federal Energy Regulatory Commission

FEBRUARY 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

78—17

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

BILLY J. McCOMBS, *et al.*,
Respondents.

78—249

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

BILLY J. McCOMBS, *et al.*,
Respondents.

On a Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF ASSOCIATED GAS DISTRIBUTORS AND BRIEF AMICUS CURIAE

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November 24, 1978

DI CESARE - Printing 331-4101 — Washington, D.C. 20006

ASSOCIATED GAS DISTRIBUTORS
Company Members

Baltimore Gas and Electric Co.
Bay State Gas Co.
The Berkshire Gas Co.
Boston Gas Co.
Bristol & Warren Gas Co.
The Brooklyn Union Gas Co.
Cape Cod Gas Co.
Central Hudson Gas & Electric Corp.
Chesapeake Utilities Corp.
City of Holyoke, Mass., Gas & Electric Dept.
City of Westfield Gas & Electric Light Dept.
Commonwealth Gas Co.
Concord Natural Gas Corp.
The Connecticut Gas Co.
Consolidated Edison Company of New York, Inc.
Delmarva Power & Light Co.
Fall River Gas Co.
Fitchburg Gas & Electric Light Co.
Gas Service, Inc.
The Hartford Electric Light Co.
Haverhill Gas Co.
Long Island Lighting Co.
Lowell Gas Co.
Lynchburg Gas Co.
Manchester Gas Co.
New Bedford Gas & Edison Light Co.
New Jersey Natural Gas Co.
New York State Electric & Gas Corp.
Northern Utilities, Inc.
The Pequot Gas Co.
Philadelphia Electric Co.
Philadelphia Gas Works
Providence Gas Co.
Public Service Company of North Carolina, Inc.
Public Service Electric & Gas Co.
Rochester Gas & Electric Corp.
South County Gas Co.
South Jersey Gas Co.
The Southern Connecticut Gas Co.
Tiverton Gas Co.
UGI Corporation
Valley Gas Co.
Washington Gas Light Co.

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On a Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Associated Gas Distributors (AGD)[1] hereby respectfully moves pursuant to Rule 42(3) for leave to

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[1]The AGD member companies are listed on the inside cover of this motion and brief.

file the attached brief as *amicus curiae* in these cases. The consent of counsel for petitioners has been obtained, but counsel for respondents has objected.

I.
STATEMENT OF INTEREST

Associated Gas Distributors is an unincorporated association of gas distribution companies serving over 11 million customers along the Eastern Seaboard or approximately 25 percent of the Nation's interstate natural gas customers. AGD member companies rely almost exclusively on interstate pipeline companies for pipeline gas supplies. As the principal pipelines supplying gas to the East Coast have sharply curtailed deliveries, beginning about 1970, AGD member companies have experienced increasing difficulty in providing adequate and reliable service to their customers, as required by various state laws governing utilities.

Since AGD companies depend heavily on gas supplies available to the interstate market, they are deeply concerned that the decision of the Court of Appeals will result in the loss of substantial volumes of flowing supplies through unauthorized abandonments. Accordingly, AGD member companies may be adversely and directly affected by the outcome of the present case.

II.
REASONS FOR GRANTING THE MOTION

On its face, the decision of the Court of Appeals applies to the disposition of natural gas production from only one lease in Karnes County, Texas—the Butler B lease. The decision held that, notwithstanding the explicit terms of Section 7(b) of the Natural Gas Act, service could be legally abandoned without approval of the Federal Energy Regulatory Commission. The principle adopted by the Court of Appeals, if affirmed, will have serious and far-reaching implications for the stability and security of interstate gas supplies. Over the last ten years, the percentage of new gas discoveries dedicated to the interstate market has dropped precipitously, making the security of flowing supplies all the more crucial to adequate interstate service. Yet the decision of the Court of Appeals would allow abandonment of potentially very significant volumes of production completely free from Commission scrutiny under Section 7(b) of the Natural Gas Act.

The petitioners have consented to AGD's filing of a brief *amicus curiae*. Although the FERC may be expected to advance generally the interests of natural gas purchasers, it does not specifically represent the East Coast purchasers that have been affected most deeply by continuing curtailment of natural gas deliveries.

The Court must look beyond the narrow question, as defined by respondents, to the issues of security and stability of present and future interstate natural gas supplies and the integrity of federal jurisdiction under the Natural Gas Act.

III.
CONCLUSION

Accordingly, and for the above reasons, Associated Gas Distributors respectfully urges the Court to grant the present motion so that AGD may present its views in the attached brief.

Respectfully submitted,

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November 24, 1978

IN THE

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For The Tenth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF ASSOCIATED GAS DISTRIBUTORS IN SUPPORT OF PETITIONERS

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On a Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF ASSOCIATED GAS DISTRIBUTORS IN SUPPORT OF PETITIONERS

QUESTION PRESENTED

Whether abandonment of certificated natural gas service may be legally accomplished by judicial

decree without the permission and approval of the Federal Energy Regulatory Commission pursuant to Section 7(b) of the Natural Gas Act.

INTEREST OF AMICUS CURIAE

Associated Gas Distributors (AGD) is an unincorporated association of gas distribution companies serving over 11 million customers along the Eastern Seaboard, or approximately 25 percent of the nation's interstate natural gas customers. AGD member companies rely almost exclusively on interstate pipeline companies for gas supplies. As the principal pipelines supplying gas to the East Coast have sharply curtailed deliveries, beginning about 1970, AGD member companies have experienced increasing difficulty in providing adequate and reliable service to their customers, as required by various state laws governing utilities.

Since AGD companies depend heavily on gas supplies available to the interstate market, they are deeply concerned that the decision of the Court of Appeals will result in substantial volumes of interstate flowing supplies being abandoned and may seriously disrupt the stability of interstate dedications of natural gas in the future. AGD member companies will be adversely and directly affected if the decision of the Court of Appeals is upheld. Accordingly, AGD submits the present brief *amicus curiae* in support of petitioners.

ARGUMENT

I. The Decision Of The Court Of Appeals Nullifies The Requirement That Natural Gas Service In Interstate Commerce May Not Be Abandoned Without Prior Approval Of The Federal Energy Regulatory Commission.

In this case, the Court of Appeals ruled that abandonment of gas service was accomplished

> as a matter of law, when all of the parties recognized that the then known natural gas reserves were depleted in 1966 followed by failure to provide any service under the certificates for a period of five years during which time there was no evidence of other estimated gas reserves recoverable from the subject leaseholds.

McCombs v. *Federal Energy Regulatory Commission*, 570 F.2d 1376, 1382 (10th Cir. 1978). This conclusion is directly contrary to the explicit requirements of Section 7(b) of the Natural Gas Act, opinions of this Court and opinions and orders of the Federal Energy Regulatory Commission (the Commission).

Section 7(b) of the Natural Gas Act clearly states the threshold requirements necessary for gas service to be abandoned:

> (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission,

> or any service rendered by means of such facilities, *without the permission and approval of the Commission first had and obtained,* after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

52 Stat. 824, 15 U.S.C. § 717f(b) (emphasis added). The language of §7(b) and Congressional intent expressed by it could not be more unequivocal. Commission "permission and approval" is simply a statutory prerequisite to abandonment of gas service. The statute leaves no room for the courts of appeals to fashion equitable remedies of *de jure* abandonment akin to common law notions of adverse possession. The Act establishes responsibility for gas service regulation including abandonment of such service in the Commission, not the courts of appeals. Indeed, the Act's comprehensive scope of federal licensing and its consumer supply protection purposes seriously undermine and belie any contrary interpretation.

As recently as last Term, the Court had occasion to address the requirements of Section 7(b). In *California* v. *Southland Royalty Co.,* 436 U.S. ____, 98 S. Ct. 1955 (1978), the Court summarized this obligation as follows:

> Once the gas commenced to flow into interstate commerce from the facilities used by the lessees, § 7(b) required that the Commission's permission be obtained prior to the discontinuance of "any service rendered by means of such facilities." Private

> contractual arrangements might shift control of the facilities and thereby determine *who* is obligated to provide that service, but the parties may not simply agree to terminate the service obligation without the Commission's permission.

436 U.S. at ____, 98 S. Ct. at 1960. The *Southland* decision was in large part premised upon *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137 (1960) where the Court noted:

> It might be observed that in these cases the Commission issued certificates without time limitations. Thus if the companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under § 7(b). The Commission thus, even though there may be physical problems beyond its control, kept legal control over the continuation of service by the applicants.

364 U.S. at 158 n.25. *See also, Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378, 389 (1959). The decision below cannot be squared with these cases which properly call for the *Commission's,* not a court of appeals', determination in the first instance as to whether sufficient grounds exist to warrant approval of abandonment of service.

Respondents and the court below have made much of the parties' recognition

> that the then known natural gas reserves were depleted in 1966 followed by failure to provide

> any service under the certificates for a period of five years during which time there was no evidence of other estimated gas reserves recoverable from the subject leaseholds.

570 F.2d at 1382. Whatever may have been the parties perception of the geological facts, it does not follow that the Commission would have accepted that view and granted abandonment without further ado. To make the latter assumption is to assume the absence of meaningful administrative procedures required by Section 7(b). This assumption seems particularly strained in light of the now obvious fact that the gas reserves were *not* depleted. By its reliance on what the parties "recognized," the Court of Appeals completely precludes the Commission from exercising its statutory responsibilities to test the reality of that perception. Had the §7(b) abandonment procedures been engaged, Respondents would have had to *prove* their case. In such circumstances, additional facts could well have arisen causing the Commission not to grant abandonment. *See, e.g., Texaco Inc., et al.,* Docket No. G-8820, Order Granting Petition for Reconsideration and Modifying Prior Order (FERC, Nov. 1, 1977).

The Court of Appeals, however, has bypassed the Commission's authority and usurped it to itself. That decision effectively nullifies the Section 7(b) requirement of *Commission* approval prior to abandonment and substitutes administration by judicial supposition.

II. If Allowed To Stand, The Decision Of The Court Of Appeals Will Have Adverse Implications For Interstate Consumers Beyond The Facts Of This Case.

Strict compliance with Section 7(b) abandonment procedures is a crucial element in the institutional framework of the natural gas industry. At issue is nothing less than the Commission's ability to assure stable and reliable supplies of natural gas for the interstate market. It can hardly be gainsaid that natural gas pipelines, distributors, their lenders and their customers place substantial reliance upon the Section 7 licensing requirements. Literally millions of miles of gas transmission and distribution lines and billions of dollars invested in public utility facilities and gas consuming equipment are predicated upon a legally secure gas supply. At the heart of this gas supply security system are the licensing requirements of Section 7(b) and 7(c) of the Natural Gas Act. Investors, pipeline companies, local utilities and the public regulatory agencies have come to rely on the knowledge that gas service will not be terminated pursuant to Section 7(b) until *after* the *Commission* finds that the supply is depleted or that abandonment is permitted under the standard of public convenience and necessity.

A judicial doctrine of equitable abandonment introduces a substantial new element of risk into gas utility operations. Each major interstate pipeline has many hundreds of supply sources. Under the decision below, the pipelines would be left with primary responsibility for the security of these supplies. At a time when, as now, there is a "seller's market," pipeline companies may not be adequately equipped to protect against premature abandonments. Depending on its

attitude toward a particular supplier's desire to terminate service, a pipeline could be placed at a competitive disadvantage in relation to another potential purchaser from the same supplier. Nor are gas distributors as a class in a position to oversee the security of their pipeline supplies. Distributors are too remotely located, too unfamiliar with the facts and, speaking practically, not able to second guess their pipeline suppliers' dealings with producer-sellers.

The matter is further exacerbated in view of the incentive for early abandonment created by the multiplicity of other buyers and the range of pricing alternatives under the recently enacted Natural Gas Policy Act of 1978, Pub. L. 95-____. Under the rate structure established in this new legislation, price ceilings range from 33 cents to $2.07 per Mcf (thousand cubic feet), depending on the date or "vintage" of the contract or the well commencement date. A given producer may find it in its interest to terminate or abandon service from an older, lower-priced source in the hope that "new service" can be commenced later from the same acreage *at the higher price* allowed for "new gas." Faithful adherence to Section 7(b) requirements is, thus, especially important to security of supply at this time.

The Natural Gas Policy Act of 1978 recognizes the overriding importance of a regulatory system which insures gas supply security. Title VI of this legislation eliminates the Commission's licensing function (previously exercised under Section 7(c) of the Natural Gas Act) with respect to *new* producer sales. At the same time, Title III of this Act imposes a "15-year or life of reserves" requirement on new sales contracts; it also provides certain purchasers with a statutory "right of first refusal" with respect to certain categories of

"deregulated" gas. *See* Natural Gas Policy Act of 1978, Pub. L. 95-____, §§ 315 and 601(a)(1)(B).

In short, the decision below establishes a dangerous and unwarranted precedent inimical to the present and future security of interstate gas supplies. The precedential weight of the decision goes far beyond the specific gas reserves at issue and will seriously undermine effective regulation under the Natural Gas Act.

CONCLUSION

The decision of the Tenth Circuit is erroneous. If allowed to stand it will significantly impair effective administration of the Natural Gas Act. For the reasons stated above, the Associated Gas Distributors respectfully requests this Court to reverse the decision below.

Respectfully submitted,

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November 24, 1978

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 1978, three copies of the foregoing Motion For Leave To File Brief *Amicus Curiae* On Behalf Of Associated Gas Distributors And Brief *Amicus Curiae* were mailed, postage prepaid, to counsel for all parties of record.

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